No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2005

DARRYL GREEN and BRANDEN MORRIS,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR ~~WRIT OF~~ CERTIORARI

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QUESTIONS PRESENTED

I. Does the First Circuit's grant of "advisory mandamus" conflict with Supreme Court law by circumventing the well-settled Congressional limits on appellate jurisdiction over a government challenge to an interlocutory order in a criminal case?

II. Did the First Circuit err in interpreting the Federal Death Penalty Act to preclude the district court from ordering separate juries for the guilt phase and punishment phase of a capital trial?

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS FOR THE FIRST CIRCUIT

The appellant in the Court of Appeals for the First Circuit was the United States of America.

The appellees in the Court of Appeals for the First Circuit were Darryl Green, Branden Morris, Edward Washington and Jonathan Hart.

Only Darryl Green and Branden Morris are petitioners herein.

The United States is the only respondent herein.

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PETITION FOR WRIT OF CERTIORARI

The petitioners, Darryl Green and Branden Morris, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit, entered in the above proceeding on May 12, 2005.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at United States v. Green, 407 F.3d 434 (1st Cir. 2005) (Green) and is reprinted in the Appendix hereto at 1a, infra. The decisions of the United States District Court for the District of Massachusetts are reported at United States v. Green, 324 F. Supp. 2d 311 (D. Mass. 2004) (Green I), reprinted at 17a, infra; United States v. Green, 343 F. Supp. 2d 23 (D. Mass. 2004) (Green II), reprinted at 54a, infra; and United States v. Green, 348 F.Supp. 2d 1 (D. Mass 2004) (Green III), reprinted at 72a, infra.

JURISDICTION

The judgment of the Court of Appeals was entered on May 12, 2005. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (2000).

RELEVANT STATUTORY PROVISIONS

The All Writs Act, 28 U.S.C. § 1651 (2000), provides:

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

The relevant portion of the Federal Death Penalty Act of 1994, 18 U.S.C. § 3593(b) (2002), provides:

> If the attorney for the government has filed a notice as required under subsection (a) and the defendant is found guilty of or pleads guilty to an offense described in section 3591, the judge who presided at the trial or before whom the guilty plea was entered, or another judge if that judge is unavailable, shall conduct a separate sentencing hearing to determine the punishment to be imposed. The hearing shall be conducted –
>
> > (1) before the jury that determined the defendant's guilt;
> > (2) before a jury impaneled for the purpose of the hearing if–
> > (A) the defendant was convicted upon a plea of guilty;
> >
> > (B) the defendant was convicted

after a trial before the court sitting without a jury;
(C) the jury that determined the defendant's guilt was discharged for good cause; or
(D) after initial imposition of a sentence under this section, reconsideration of the sentence under this section is necessary; or
(3) before the court alone, upon the motion of the defendant and with the approval of the attorney for the government.

STATEMENT OF THE CASE

This case concerns a pretrial order establishing separate juries to hear the guilt phase and the punishment phase of a death penalty trial in a complex multiple-count, multiple-defendant racketeering case. The United States District Court for the District of Massachusetts had original jurisdiction over the case pursuant to 18 U.S.C. § 3231 (1993).

On September 17, 2003, a federal grand jury returned a superseding indictment that charges five defendants – Darryl Green, Jonathan Hart, Edward Washington, Branden Morris and Torrance Green – in seventeen counts. The indictment alleges that the five defendants and more than twenty unindicted co-conspirators were members of a racketeering enterprise known as "Esmond Street." This enterprise allegedly distributed crack cocaine and marijuana in the area of Esmond Street in the Dorchester section of Boston, Massachusetts, and committed acts of violence to prevent members of a rival group from selling crack and marijuana in the area. The counts include racketeering, conspiracy, and, for the petitioners Darryl Green and Branden Morris, a murder charge that exposes them to the death penalty.

Litigation on the defendants' motions to sever began in March 2004 and did not conclude until December 2004.[1] On June

[1] All of the defendants, except Torrence Green, filed motions to sever their trials from other defendants. The government previously had informed counsel that Torrence Green would be tried alone pursuant to Bruton v. United States, 391 U.S. 123 (1968). Green I, 424 F. Supp. 2d at 318 n.11. Thus, the defendants

2, 2004, after several rounds of briefing and a hearing, the district court issued a severance order grouping the five defendants into three trials; two of the trials included a capital defendant. The government moved for reconsideration. On July 7, 2004, the court ruled that its severance decision was final but invited further briefing on whether the juries deciding the guilt phase of the trials should be death-qualified. United States v. Green, 324 F. Supp. 2d 311, 333 (D. Mass. 2004) (Green I).

On November 4, 2004, the court ruled that it would impanel a non-death-qualified jury for the guilt phase proceedings and, if necessary, impanel a second, death-qualified jury for the punishment proceedings. United States v. Green, 343 F. Supp. 2d 23, 27 (D. Mass. 2004) (Green II).[2] It entered this dual-jury order pursuant to the Federal Death Penalty Act, 18 U.S.C. § 3593(b)(2)(c), which permits a district court to impanel a second jury to hear the penalty phase of the trial if the guilt jury is dismissed for "good cause." The district court grounded the dual-jury order in its concerns about the daunting complexity of the indictment; the multiple severance issues, including the irreconcilable defenses and Bruton issues; the combination of capital and non-capital defendants; judicial economy; and fairness to both the government and the defendants. Green II, 343 F. Supp. 2d at 33-35; Green I, 324 F. Supp. 2d at 324-28.

The district court was particularly cognizant of the unique challenges of death-qualifying a jury in the Eastern District of Massachusetts, whose demographic features include a high rate of opposition to the death penalty as well as a significant under-representation of African Americans in the jury pool.[3] The court

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were seeking five separate trials.

[2] On December 29, 2004, the district court issued Additional Findings in support of its order. Green III, 348 F. Supp. 2d 1 (D. Mass. 2004).

[3] The under-representation of African Americans in jury venires in the District of Massachusetts is a long-standing and serious problem. United States v. Royal, 174 F.2d 1, 12 (1st Cir. 1999); United States v. Hafen, 726 F.2d 21, 23 (1st Cir. 1984). When this systemic under-representation is combined with the fact that African Americans oppose the death penalty at a much higher rate than white Americans, death qualification of the guilt jury would, in all likelihood, mean that the African-American defendants in this case would face an all-white jury. Green

also recognized the strong possibility that no punishment jury would ever be needed, noting that another district court judge previously had held that the government's case had profound weaknesses and that the defendants had strong defenses on the merits. Green II, 343 F. Supp. 2d at 27 n.2 & 32; Green I, 324 F. Supp. 2d at 329. Avoiding death-qualification of the guilt jury, the court observed, ultimately could conserve time and judicial resources. Green I, 324 F. Supp. 2d at 329.

The government immediately appealed from this order, complaining that it contravened 18 U.S.C. § 3593(b) and deprived the government of the opportunity to death-qualify the jurors who will hear the guilt phase of the trial. The government acknowledged that the court of appeals lacked jurisdiction under the Criminal Appeals Act, 18 U.S.C. § 3731 (2002). See Gov't Brief at 25. The government contended, however, that the court of appeals possessed appellate jurisdiction under 28 U.S.C. § 1291 (1993), via the judicially created collateral order doctrine, as well as jurisdiction under the All Writs Act, 28 U.S.C. § 1651, via the extraordinary remedy of mandamus.

The defendants, in turn, contended that the court of appeals lacked appellate jurisdiction to review the order, and that the historical limitations on government appeals in criminal cases could not be avoided by resort to an extraordinary writ. They additionally argued that on the merits, the district court's dual-jury order satisfied both the procedural and substantive requirements of the "good cause" exception set forth in § 3593.

On May 12, 2005, a panel of the United States Court of Appeals for the First Circuit issued a writ of mandamus to review the government's petition challenging the district court's interlocutory order. United States v. Green, 407 F.3d 434, 444 (1st Cir. 2005). In its opinion, the panel considered each of the three jurisdictional theories offered by the government: the collateral order doctrine, supervisory mandamus, and advisory mandamus. While declining to "definitively resolve the appealability question" pursuant to the collateral order doctrine, the panel noted that the

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II, 343 F. Supp. 2d at 35.

use of that doctrine is "problematic in the circumstances of this case." Id. at 438. As to either stripe of mandamus ("supervisory" or "advisory"), the court simply assumed, without any discussion of the issue, that it possessed jurisdiction under the All Writs Act, and then turned to the question of whether the substantive requirements of a writ of mandamus were satisfied in this case. Id. at 439. The court rejected the application of supervisory mandamus on the ground that the government failed to demonstrate irreparable harm, an essential requirement of the doctrine. Id. The panel held that the doctrine of "advisory mandamus" was "more apt" because it did not require a showing of irreparable harm. Id.

In exercising its purported "advisory mandamus" authority, the panel held that the district court's dual-jury order was not consistent with § 3593 and vacated it. Id. at 440-44. The petitioners now seek certiorari review.

REASONS FOR GRANTING THE PETITION

I. THE FIRST CIRCUIT'S GRANT OF MANDAMUS TO REVIEW THE DISTRICT COURT'S INTERLOCUTORY ORDER CONFLICTS WITH SETTLED LAW OF THIS COURT

The First Circuit's grant of mandamus contravened the well-settled law of this Court that a writ of mandamus may not be used to evade the jurisdictional limitations on government appeals in criminal cases. This Court has emphasized repeatedly that the criminal context is unique with respect to the availability of appellate review. Even in circumstances in which the government's case is crippled by a district court's order, no interlocutory appellate review may be available. Congress created these limitations on government appeals in criminal cases; they may not be circumvented by judicially created exceptions. The use of mandamus in the present case is precisely the type of end-run around the statutory limitations for government appeals this Court has forbidden.

Two fundamental barriers preclude the First Circuit's reliance on mandamus in this case. First, this Court repeatedly has held that the All Writs Act does not provide an independent basis for jurisdiction and may not be used to circumvent Congressional limits on the power of an appellate court to review interlocutory orders. Second, the First Circuit's opinion further conflicts with this Court's holdings by failing to require the government to satisfy two essential criteria of mandamus doctrine.

The actions of the First Circuit in this case are not unique to it. Other Courts of Appeal regularly and mistakenly assume that the All Writs Act provides broad, independent jurisdiction to review interlocutory orders in criminal cases. Many of the circuits also fail to adhere to the strict requirements for issuance of a writ. The unrestrained use of extraordinary writs threatens the orderly administration of criminal justice in the federal courts and requires correction by this Court.

A. The First Circuit Contravened Supreme Court Law by Using Mandamus to Evade Limits on Appellate Review of the District Court's Interlocutory Order

The historical limitations on government appeals in criminal cases have been repeatedly emphasized by this Court. "[A]ppeals by the Government in criminal cases are something unusual, exceptional, not favored." Carroll v. United States, 354 U.S. 394, 400 (1957). The disruption and delay caused by interlocutory review is "especially inimical to the effective and fair administration of the criminal law." Abney v. United States, 431 U.S. 651, 657 (1977) (quoting DiBella v. United States, 369 U.S. 121, 126 (1962)). "Many interlocutory decisions of a trial court may be of grave importance to a litigant, yet are not amenable to appeal at the time entered, and some are never satisfactorily reviewable. In particular is this true of the Government in a criminal case . . ." Carroll, 354 U.S. at 406. "Congress clearly contemplated when it placed drastic limits upon the Government's right of review in criminal cases that it would be completely unable to secure review of some orders having a substantial effect on its ability to secure criminal convictions." Will v. United States, 389 U.S. 90, 98 n.5 (1967).

The government's ability to appeal in a criminal case requires express statutory authorization, such as provided in the Criminal Appeals Act, 18 U.S.C. § 3731. See United States v. Sanges, 144 U.S. 310, 312 (1892). Congress chose to establish no general provision for interlocutory appeals in criminal cases.[4] Rather, it confined the government's ability to appeal to narrow circumstances: (1) an order dismissing an indictment or granting a new trial after verdict or judgment in favor of the government; (2) an order suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding; or (3) an order granting the release of a person charged with or convicted of an offense, or denying a motion for revocation of, or modification of the conditions of, a decision or order granting release. 18 U.S.C. § 3731.[5]

The government conceded that there is no statutory authority that would provide appellate jurisdiction to review the district court's interlocutory order in this case. See Gov't Brief at 25. Nor was the collateral order doctrine a viable source of jurisdiction. Green, 407 F.3d at 438.

This same absence of statutory authorization also precludes mandamus review. The All Writs Act confines the writ of mandamus to situations in which it is "in aid of" the jurisdiction of the courts of appeal. 28 U.S.C. § 1651. This Court long ago made clear that an appellate court may issue the writ only if it possesses "potential" appellate jurisdiction:

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[4] Significantly, Congress enacted an interlocutory appellate statute solely for the civil context. See 28 U.S.C. § 1292 (1992). United States v. Carrillo-Bernal, 58 F.3d 1490, 1494-1497 (10th Cir. 1995) sets out the history of the government's right to appeal in criminal cases. That history shows Congress' grudging acceptance of government appellate rights expressly limiting them to specific categories of order.

[5] If Congress wished to expand the categories of appealable orders to include the type of order entered in this case, it had ample opportunity to do so. The Criminal Appeals Act has undergone amendment seven times (1949, 1968, 1971, 1984, 1986, 1994, 2002) since its enactment in 1948, and as recently as 2002. The amendments of 1986, 1994, and 2002 did not expand the categories of orders for which the government is authorized to seek appellate review.

> As the jurisdiction of the circuit court of appeals is exclusively appellate, its authority to issue writs of mandamus is restricted by statute to those cases in which the writ is in aid of that jurisdiction. Its authority is not confined to the issuance of writs in aid of a jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected.

Roche v. Evaporated Milk Ass'n., 319 U.S. 21, 25 (1943); see also LaBuy v. Howes Leather Co., 352 U.S. 249, 255 (1957).

Subsequent opinions of this Court have confirmed that the All Writs Act is not an independent source of jurisdiction, and therefore only confers power to a court of appeal to issue writs "in aid of" jurisdiction provided by some other provision of law. See Syngenta Crop Protection Inc. v. Henson, 537 U.S. 28, 34 (2002) (holding that the All Writs Act does not confer original jurisdiction on the federal courts to support removal); Clinton v. Goldsmith, 526 U.S. 529, 534-35 (1999) (holding that the All Writs Act does not enlarge the jurisdiction of the Court of Appeals for the Armed Forces); Parisi v. Davidson, 405 U.S. 34, 44 (1972) (holding that the All Writs Act does not support the Court of Military Appeals' jurisdiction to review an order over which it did not otherwise possess appellate jurisdiction); Tidewater Oil Co. v. United States, 409 U.S. 151, 160 (1972) (noting that in light of the exclusive jurisdiction of the Supreme Court over appeals in government antitrust cases, the All Writs Act would only support jurisdiction for a writ of mandamus issued by the Supreme Court and not the courts of appeal); see also In re Tennant, 359 F.3d 523, 527-28 (D.C. Cir. 2004); 16 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3932 at 470 (2d ed. 1996) ("The All Writs Act . . . is not an independent grant of appellate jurisdiction.").

This Court has not been required to explicitly resolve the question of whether jurisdiction exists under the All Writs Act to issue a writ of mandamus at the request of the government in the context of a criminal case. Indeed, the Court last spoke on this

issue nearly forty years ago in Will, 389 U.S. at 96-98. In Will, the government successfully petitioned the Court of Appeals for the Seventh Circuit for mandamus review, and this Court reversed the grant of the writ without ruling on the question of potential jurisdiction:

> It is . . . unnecessary for us to reach the question whether the writ in the circumstances of this case may be said to issue in aid of an exercise of the Court of Appeals' appellate jurisdiction. In our view, even assuming that the possible future appeal in this case would support the Court of Appeals' mandamus jurisdiction, it was an abuse of discretion for the court to act as it did in the circumstances of this case.

Id. at 95 n.4 (internal citations omitted). Although Will decided the case on grounds other than jurisdiction, the Court signaled its intent as to how it would handle questions of jurisdiction in future governmental requests for review of interlocutory court orders in criminal cases:

> All our jurisprudence is strongly colored by the notion that appellate review should be postponed, except in certain narrowly defined circumstances, until after final judgment has been rendered by the trial court. This general policy against piecemeal appeals takes on added weight in criminal cases, where the defendant is entitled to a speedy resolution of the charges against him. Moreover, in the federal jurisprudence, at least, appeals by the Government in criminal cases are something unusual, exceptional, not favored, at least in part because they always threaten to offend the policies behind the double-jeopardy prohibition. Government appeal in the federal courts has thus been limited by Congress to narrow categories of orders terminating the prosecution, see 18 U.S.C. § 3731, and the Criminal Appeals Act is strictly construed against the Government's right of

> appeal. Mandamus, of course, may never be employed as a substitute for appeal in derogation of these clear policies. Nor is the case against permitting the writ to be used as a substitute for interlocutory appeal made less compelling by the fact that the Government has no later right to appeal. . . . [T]his Court has never approved the use of the writ to review an interlocutory procedural order in a criminal case which did not have the effect of a dismissal.

Id. at 96-98 (internal quotation marks and citations omitted). As set forth above, this Court has made it clear in numerous post-Will decisions that the absence of potential jurisdiction in the court of appeals to review an interlocutory order forecloses reliance on the All Writs Act as the jurisdictional basis to issue a writ of mandamus.[9] See section I-A, supra.

Indeed, this Court explicitly has held that mandamus law may not be used to circumvent restrictions on appellate jurisdiction. Mandamus may never be employed "as a substitute for appeal" in derogation of the clear policy against piecemeal appeals or to evade "the settled limitations upon the power of an appellate court to review interlocutory orders." Will, 389 U.S. at

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[9] Petitioners are aware of one post-Will case in which this Court permitted mandamus review on a government petition in a criminal case. In United States v. United States Dist. Ct. For the E. Dist. of Mi[illegible], S. Div., 407 U.S. 297 (1972), the government sought mandamus after the dis[illegible]t court ordered disclosure of transcripts of certain illegal government wiretaps. There, the issue of mandamus jurisdiction was not challenged in the Supreme Court, and the discussion of it was confined to a footnote; accordingly, it is impossible to know the basis for the Court's ruling. Id. at 301 n.3. It seems logical, however, that the Court found jurisdiction on the ground that the district court's order was, in practical effect although not in form, a suppression order. The court found that the evidence was illegally seized and, but for the fact that the order was not in the form of a suppression order, it would have been appealable pursuant to the Criminal Appeals Act, 18 U.S.C. § 3731. Thus, "potential jurisdiction" for purposes of the All Writs Act was established. See, e.g., United States v. Roberts, 88 F.3d 872, 884 (10th Cir. 1996) superceded by statute on other grounds by United States v. Meacham, 115 F.3d 1488 (10th Cir. 1997) (noting that mandamus may lie in the circumstance of a district court's deferral of an evidentiary ruling for the purpose of insulating an appeal by the government that would have the effect of defeating its potential jurisdiction).

96-98 & n.6. The First Circuit did precisely that, ignoring the All Writs Act's jurisdictional limitation and expanding mandamus review to allow the government to revisit what it could never challenge via appeal.

B. The First Circuit's Ruling Also Failed to Comply with this Court's Elemental Mandamus Requirements

Even if the mandamus writ somehow could be said to be "in aid of" jurisdiction in this case, certiorari would be warranted to address another issue. Here, the First Circuit's issuance of the writ directly conflicts with two of this Court's bedrock mandamus requirements: that the district court's order must involve a "judicial usurpation of power" and that the government must show that the right to issuance of the writ is "clear and indisputable." See Cheney v. United States Dist. Court for Dist. of Columbia, 542 U.S. 367, 124 S.Ct. 2576, 2587 (2004) (citations omitted). Neither of these necessary criteria were met in this case.

It appears that the First Circuit ignored these essential mandamus requirements because it decided this case under its highly anomalous "advisory mandamus" doctrine. In First Circuit jurisprudence, advisory mandamus is distinguished by its focus on "issues of particular importance and novelty." In re Justices of the Superior Court Dept. of the Mass. Trial Court, 218 F.3d 11, 15 n.4 (1st Cir. 2000). The only requirements for "advisory mandamus" in the First Circuit are that the issue presented in the district court's order be novel, of great importance, and likely to recur. Green, 407 F.3d at 439 (citing United States v. Horn, 29 F.3d 754, 769 (1st Cir. 1994)).[2/] Accordingly, the First Circuit's concept of advisory mandamus relieves a petitioner from satisfying the basic elements of ordinary or supervisory mandamus. See id. (stating that advisory mandamus requires no showing of irreparable harm); In re Sterling-Suarez, 306 F.3d 1170, 1172 (1st Cir. 2002) (stating

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[2/] By contrast, "supervisory mandamus" in the First Circuit requires a showing that the order at issue "presents a question anent the limits of judicial power, poses some special risk of irreparable harm to the appellant, and is palpably erroneous." Horn, 29 F.3d at 769; see also Green, 407 F.3d at 439 (omitting error requirement).

that under advisory mandamus, "[t]he question whether there is a threat of irreparable injury and clear error need not be decided"); Horn, 29 F.3d at 769 (noting that advisory mandamus "may lie even though all the usual standards have not been met").[1/]

This permissive approach does not comport with Supreme Court precedent, however. Although advisory mandamus has its roots in the civil case Schlagenhauf v. Holder, 379 U.S. 104, 110 (1964), that decision did not announce a wholly new doctrine, but rather articulated a different rationale for the necessity of mandamus: review of novel and important questions that had not been previously presented to a court. Significantly, the Schlagenhauf Court determined that the district court's order presented a classic usurpation of power. Id. Thus, the novelty and importance of the issues presented were not, standing alone, sufficient reasons for granting mandamus. Indeed, this Court's subsequent discussions of mandamus have cited Schlagenhauf to illustrate basic, conventional mandamus rules. See, e.g., Cheney, 124 S.Ct. at 2587; Will, 389 U.S. at 104 n.14. In sum, Schlagenhauf cannot support the First Circuit's idiosyncratic approach to mandamus.

The requirements of judicial usurpation of power and clear error recently were explicitly reaffirmed in Cheney. 124 S.Ct. at 2587. This Court reiterated that "only exceptional circumstances amounting to a judicial usurpation of power, or a clear abuse of discretion, will justify the invocation of this extraordinary remedy." Id. Among other prerequisites to the writ, a petitioner must satisfy "the burden of showing that [his] right to issuance of the writ is clear and indisputable." Id. (internal quotation marks and citations omitted).

Nothing in Cheney – or in any Supreme Court case – supports the notion that general mandamus requirements should be

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[1/] The First Circuit stands alone among the courts of appeal in drawing such definite distinctions between advisory and supervisory mandamus. Several circuits appear to never use the term "advisory mandamus," much less apply a different test. Others follow the Bauman test, which flexibly applies five factors encompassing both advisory and supervisory bases for the writ. See Bauman v. United States Dist. Court, 557 F.2d 650, 654-655 (9th Cir. 1977).

suspended when the writ will serve an advisory function.[8] Indeed, Cheney itself touched on factors invoking the First Circuit's advisory-mandamus principles: it focused on the unusual and important role of the Vice Presidency and suggested that the extraordinary need to preserve orderly relationships between the judiciary and the executive branches may justify writ review in circumstances in which private litigation would not warrant it. Id. at 2592-93. Accordingly, Cheney confirms that the fact that a mandamus petition invokes advisory concerns does not excuse a petitioner's compliance with the usual requirements of the writ.

By using its advisory mandamus doctrine to sidestep the requirement that the district court's order involve a "judicial usurpation of power," the First Circuit's issuance of the writ contravened Supreme Court law and relegated the doctrine to precisely what this Court has repeatedly stated it should not be: an alternative to appellate review. Yet it is beyond dispute that legal error alone does not suffice to ground the drastic remedy of mandamus review; rather, the action or inaction of the court must amount to a "judicial usurpation of power." Will, 389 U.S. at 98. The purpose of mandamus is not to "control the decision of the trial court, but rather merely to confine the lower court to the sphere of its discretionary power." Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 382 (1953). "Whereas a simple showing of error may suffice to obtain a reversal on direct appeal, to issue a writ of mandamus under such circumstances 'would undermine the settled limitations upon the power of an appellate court to review interlocutory orders.'" Will v. Calvert Fire Ins. Co., 437 U.S. 655, 661 (1978) (quoting Will v. United States, 389 U.S. at 98 n.6).

Here, the district court's order construed § 3593 of the Federal Death Penalty Act to permit a determination of good cause for a separate punishment jury at the outset of a trial, and then found that such good cause existed under the unusual factual circumstances of this case. Green II, 343 F. Supp. 2d at 30-33; Green I, 324 F. Supp. 2d at 331-32. This ruling did not present "a question anent the limits of judicial power," Horn, 29 F.3d at 769, but rather an ordinary question of statutory interpretation that

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[8] Like other Supreme Court decisions concerning mandamus law, Cheney does not explicitly refer to "advisory mandamus."

cannot be reviewed for legal error under a writ of mandamus. See United States v. Horak, 833 F.2d 1235, 1252 (7th Cir. 1987) (holding that questions of statutory interpretation, even if erroneous, do not require the issuance of a writ of mandamus). Put another way, even if the district court erred in its interpretation of the Federal Death Penalty Act, the conflict between the parties lay "in the geography of legal error." United States v. Kane, 646 F.2d 4, 10 (1st Cir. 1981). "If we assume . . . that the judge is wrong on all points, [her] wrongness would be the kind of error, grounded on differing perceptions of where lines should be drawn, which would be grist for the appellate but not for the mandamus mill." Id. Accordingly, the grant of mandamus review constituted a circumvention of Congressional mandate as well as Supreme Court precedent. See Will v. United States, 389 U.S. at 95-97 & n.5; Kane, 646 F.2d at 9-10.

The First Circuit's decision also conflicts with applicable Supreme Court law in another regard: it fails to comply with the requirement that the petitioner bear "the burden of showing that [its] right to issuance of the writ is clear and indisputable." Cheney, 124 S.Ct. at 2587 (internal quotation marks and citations omitted). As noted supra, the First Circuit wrongly excused compliance with this requirement via its anomalous advisory mandamus doctrine. See Green, 407 F.3d at 439-40; see also Sterling-Suarez, 306 F.3d at 1172 (holding that under advisory mandamus, "[t]he question whether there is . . . clear error need not be decided").

In this case, any suggestion that the government clearly was entitled to the writ is unfounded. See Green, 407 F.3d at 439. The essence of the government's complaint is merely that the district court wrongly construed § 3593 so as to deprive the government of selecting a death-qualified jury for the guilt phase of the trial. As the government cannot locate such a "right" to a death-qualified guilt jury in any constitutional or statutory provision, it has not asserted any injury justifying redress via mandamus. See section II, infra. Moreover, as explained below, there is no error – much less plain error – in the district court's interpretation of § 3593, or in its fact-specific determination of "good cause" for the dual-jury order. See section II. The First

Circuit's attempt to ignore the requirement that the government be clearly entitled to the writ thus is fatal to its grant of mandamus.

C. The Repeated Failures of the First Circuit and Other Courts of Appeal to Impose this Court's Mandamus Requirements Threaten the Orderly Administration of Criminal Justice in the Federal Courts

In Will v. United States, this Court granted certiorari to review the propriety of a writ of mandamus issued by a court of appeals in a criminal case "because of the wide implications of the decision below for the orderly administration of criminal justice in the federal courts." 389 U.S. at 94. In this case, the issuance of the writ is not only contrary to settled Supreme Court law governing the jurisdictional and substantive requirements of mandamus, it also threatens the administration of criminal justice by disregarding the cautions expressed in Will.

As explained supra, section 1-A, this Court has set forth clear rules requiring potential appellate jurisdiction to support a mandamus petition and prohibiting the use of the writ as a substitute for appeal. See Clinton, 526 U.S. at 534-35; Will v. United States, 389 U.S. at 96-98. Still, the Court has not yet specifically addressed the parameters of these rules in the context of a government petition in a criminal case. As a result, various courts of appeal have developed their own idiosyncratic standards for the issuance of writs, many of which contravene Supreme Court law.

Most courts of appeal regularly have permitted mandamus review without distinguishing between the automatic right of appeal in civil cases [10] and the strictly circumscribed right of appeal in criminal cases. See, e.g., United States v. Moussaoui, 333 F.3d 509, 516-17 (4th Cir. 2003); United States v. Barker, 1

[10] The "in aid of" jurisdiction requirement poses no hurdle in most civil cases, where it is beyond question that the appeals courts possess potential jurisdiction following a final judgment. See 28 U.S.C. § 1291.

F.3d 957, 958-59 (9th Cir. 1993); In re United States, 878 F.2d 153, 158-59 (5th Cir. 1989); United States v. Palmer, 871 F.2d 1202, 1209-10 (3d Cir. 1989), abrogated on other grounds by Taylor v. United States, 495 U.S. 575 (1990); United States v. Fernandez-Toledo, 737 F.2d 912, 919 (11th Cir. 1984). Absent application of the limiting principles stated in Will, these cases essentially have given free rein to the government to circumvent the restrictions on criminal appeals via mandamus.[4] Even those few courts that have grappled with Will's analysis have reached divergent results. See, e.g., United States v. Weinstein, 452 F.2d 704, 712 (2d Cir. 1971) (concluding that Will did not preclude mandamus from properly issuing to review an order dismissing an indictment after the verdict); United States v. McVeigh, 106 F.3d 325, 331-33 (10th Cir. 1997) (holding that Will's analysis precluded mandamus review of order prohibiting victim-witnesses from attending prosecutions in which they were slated to testify).

The First Circuit, in particular, has adopted an impermissibly broad definition of potential jurisdiction in criminal cases. In Kane, the government petitioned for mandamus to review a discovery order. 646 F.2d at 5. Without reference to Will's jurisdictional analysis, the court broadly interpreted potential jurisdiction to extend to those cases in which a defendant might appeal from a conviction. Id. at 9. The Kane court's ruling, like the First Circuit's ruling in the case at bar, turned the traditional jurisdictional limitation on government appeals on its head.

In sum, the courts of appeal have steadily and improperly expanded the government's authority to utilize mandamus in the absence of Congressional authorization. Granting certiorari on this question would provide much-needed certainty to the circuit courts

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[4] Indeed, some courts of appeal have misconstrued mandamus requirements to suggest that the lack of potential appellate jurisdiction actually favors the availability of mandamus review. See, e.g., Mousseaui, 333 F.3d at 516-17; Palmer, 871 F.2d at 1209-10. This interpretation contravenes the Will Court's statement that "the case against permitting the writ to be used as a substitute for interlocutory appeal '[is no] less compelling . . . by the fact that the Government has no later right to appeal '" 389 U.S. at 97 & n.5 (quoting DiBella, 369 U.S. at 130); accord Carroll, 354 U.S. at 406 (noting that the fact that review may never be available is insufficient to require appellate courts to review an order that is plainly interlocutory).

as well as correct the immediate injustice perpetrated by the First Circuit in this case.

The courts of appeal also are conflicted as to the very elements of mandamus. Five circuits (the Sixth, Eighth, Ninth, Tenth, and D.C.) have adopted the five-prong Bauman test, which examines whether (1) petitioner has no other adequate means of attaining the desired relief; (2) petitioner will be irremediably damaged or prejudiced; (3) the order is clearly erroneous as a matter of law; (4) the order manifests an oft-repeated error or a persistent disregard of federal rules; and (5) the order raises new and important problems or issues of law of first impression.[12/] Bauman, 557 F.2d at 654-655. The remaining circuits impose inconsistent requirements for mandamus. See, e.g., In re Patenaude, 210 F.3d 135, 141 (3d Cir. 2000) (stating that the prerequisites for issuance of a writ are (1) that petitioner have no other adequate means to attain the desired relief, and (2) that petitioner meets its burden of showing that its right to the writ is clear and indisputable); In re United States, 197 F.3d 310, 313 (8th Cir. 1999) (noting that ordinarily a writ of mandamus will generally not be available to obtain interlocutory review of a discovery order, but granting the writ nonetheless because "in this matter there are significant policy issues requiring immediate attention," and "direct appeal cannot provide an adequate remedy"); Matter of Balsimo, 68 F.3d 185, 186 (7th Cir. 1995) (applying two-prong standard: (1) the order imposes irreparable harm, and (2) is so clearly wrong as to constitute usurpative act); In re Larson, 43 F.3d 410, 412 (8th Cir. 1994) (applying three-prong test of clear and indisputable right to relief, the court's non-discretionary duty to honor the right, and no other adequate remedy available). Finally, as noted supra, the First Circuit is unique in recognizing two wholly separate forms of mandamus. See section I-B & n.8.

This confusion as to the basic requirements for a writ of mandamus is particularly problematic in cases involving government petitions in criminal cases. In Will, this Court

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12/ Indeed, even among the Baumann circuits, some decisions have diverged from the five-factor test. See, e.g., In re United States, 197 F.3d 310, 313 (8th Cir. 1999); Nichols v. Alley, 71 F.3d 347, 350 (10th Cir. 1995); In re Larson, 43 F.3d 410, 412 (8th Cir. 1994).

commented that the criminal context of the case informed its analysis of whether mandamus should issue:

> [T]his Court has never approved the use of the writ to review an interlocutory procedural order in a criminal case which did not have the effect of a dismissal. We need not decide under what circumstances, if any, such a use of mandamus would be appropriate. It is enough to note that we approach the decision in this case with an awareness of the constitutional precepts that a man is entitled to a speedy trial and that he may not be placed twice in jeopardy for the same offense.

389 U.S. at 98. Yet few of the circuit courts have expressly taken these factors into consideration when addressing government petitions in criminal cases, or even have referenced Will in their decisions.

Here, the First Circuit did not even mention Will's cautionary analysis in its opinion below, much less assess its implications for this case. Rather, it relaxed its standards for mandamus review in precisely the type of case warranting the most stringent protections against disruption and delay: a criminal case in which the defendants face the death penalty. A grant of certiorari in this case will allow the Court to re-establish its firm parameters governing writs of mandamus in criminal cases and to protect and promote order in the administration of criminal justice in the federal courts.

II. THE FIRST CIRCUIT ERRED IN INTERPRETING THE FEDERAL DEATH PENALTY ACT TO PREVENT THE DISTRICT COURT FROM ORDERING DUAL JURIES

Although the petitioners recognize that the First Circuit's erroneous ruling that the Federal Death Penalty Act precludes dual juries might not, standing alone, warrant certiorari, here the merits of the First Circuit's decision are inextricably intertwined with the jurisdictional issues discussed supra. See Cheney, 124 S.Ct. at

2587 (importing into the mandamus threshold requirements the question of whether the petitioner's substantive right to issuance of the writ is clear and indisputable). The First Circuit's erroneous grant of mandamus jurisdiction was prejudicial in this case. After flouting Supreme Court precedent concerning the jurisdictional foundation and required elements of mandamus, the First Circuit went on to wrongly decide that the Federal Death Penalty Act prevented the district court from ordering dual juries in this case. See Green, 407 F.3d at 440-44.

A. The Government Failed to Assert that the District Court's Order Imposed a Deprivation of Any Legal Significance

The government is entitled simply to impartial jurors whose views on the death penalty will not "prevent or substantially impair the performance of [their] duties as [jurors] in accordance with [their] instructions and [their] oath." Wainwright v. Witt, 469 U.S. 412, 424 (1985). While the government may require a death-qualification voir dire for the punishment phase jurors, Morgan v. Illinois, 504 U.S. 719, 733-34 (1992), no constitutional requirement mandates such treatment for the guilt phase jurors. Here, the district court fulfilled its impartiality obligation by ordering that the guilt jury not be informed that this is a death penalty case, thus obviating the need for any form of death qualification in that phase. Green II, 343 F. Supp. 2d at 25. The government cannot plausibly claim that impartiality requires that jurors who do not know that they are sitting on a death penalty case be interrogated about their views on that subject.

Although this Court has held that the United States Constitution does not require a dual jury procedure, never has it prohibited a district court from ordering dual juries in the interest of fairness. See Buchanan v. Kentucky, 483 U.S. 402, 414-15 (1987); Lockhart v. McCree, 476 U.S. 162, 173-74 (1986). Indeed, as long ago as Witherspoon v. Illinois, 391 U.S. 510, 521 n.18 (1968), it recognized that a "bifurcated trial, using one jury to decide guilt and another to fix punishment" offered "the possibility of accommodating both interests," that is, "the State's interest in submitting the penalty issue to a jury capable of imposing capital punishment" and "the defendant's interest in a completely fair

determination of guilt or innocence." The district court's order below vindicates both parties' interests by providing for the requisite death-qualified jury for the punishment phase and a non-death-qualified jury, unaware of the capital context of the case, for the guilt phase. Green II, 343 F. Supp. 2d at 25.

B. The Federal Death Penalty Act Permits the District Court to Determine Whether There is Good Cause for Discharging the Guilt Jury Before a Verdict is Rendered

The government argued below that § 3593(b) of the Act should be interpreted to restrict "good cause" to situations that arise after the jury has returned a guilty verdict. This construction contravenes the plain text of the statute as well as the principle that Congress must speak with particular clarity if it intends to abridge the district court's traditional trial management function. Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982).

First, the plain language of the statute does not forbid a district court to choose dual juries for good cause at the outset of the trial. 18 U.S.C. § 3593(b) provides, in relevant part:

> [T]he judge who presided at the trial . . . shall conduct a separate sentencing hearing to determine the punishment to be imposed. The hearing shall be conducted –
>
> (1) before the jury that determined the defendant's guilt; (2) before a jury impaneled for the purpose of the hearing if
>
> (A) the defendant was convicted upon a plea of guilty;
> (B) the defendant was convicted after a trial before the
> court sitting without a jury;
> (C) the jury that determined the defendant's guilt was discharged for good cause; or
> (D) after initial imposition of a sentence under this

> section, reconsideration of the sentence under this section is necessary; or
>
> (3) before the court alone, upon the motion of the defendant and with the approval of the attorney for the government.

(emphasis added).

The First Circuit erred in concluding that good cause may be found only upon a motion made after the jury renders a guilty verdict. Green, 407 F.3d at 441-43. Its construction confuses three points in time: when good cause arises, when good cause is determined by the district court, and when the jury is discharged for good cause. Subsection 3593(b)(2)(C) speaks only to the third point, and indicates simply that the guilt jury must be discharged for good cause before the punishment jury is impaneled. That is precisely the sequence of events that the district court proposed in this case. The district court planned to impanel a non-death-qualified jury to hear the guilt phase; if that jury returned a guilty verdict, it would be discharged for good cause, and a death-qualified jury would be impaneled for the purpose of the punishment phase. Green II, 343 F. Supp. 2d at 25. Hence, the district court's dual-jury order was fully consistent with the plain language of the statute.[13/]

Second, the First Circuit's construction of the statute makes the "good cause" provision redundant. Without the "for good cause" language – that is, if section (C) simply read, "the jury that determined the defendant's guilt was discharged" – the district court still would have the power to discharge the jury for incapacity or any other manifest necessity. See United States v. Toribio-Lugo, 376 F.3d 33, 39 (1st Cir. 2004). Thus, the good cause provision indicates that the district court possessed the power to discharge the jury for reasons other than manifest necessity, at the request of, or with consent of, the defendant. This

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[13/] The order also represents sound criminal trial management. If the district court is aware at the outset of a trial of good cause for a dual jury, judicial economy requires that the order be made before undergoing the expense and delay of death-qualification, rather than at the conclusion of the guilt phase

interpretation is the only one that gives effect to the entire statutory text.

Third, the First Circuit's construction of § 3593 contravenes the principle that Congress must speak with utmost clarity if it seeks to limit the district court's traditional trial management powers. The district court historically has possessed broad discretion to manage trials as it reasonably sees fit. See United States v. Saccoccia, 58 F.3d 754, 770 (1st Cir. 1995) (holding that "trial management is peculiarly within the ken of the district court"); Advisory Committee Notes to Fed. R. Crim. P. 57(b) (stating that certain matters are left to individual courts to regulate, including "the mode of impaneling a jury").

Whenever Congress legislates in a well-settled area of law, it must speak clearly. See Weinberger, 456 U.S. at 313. Section 3593 does not, however, expressly forbid the district court to order dual juries in its discretion at the outset of a trial; nor is there any legislative history indicating that Congress intended to do so. Therefore, in the absence of "clear and unmistakable" Congressional intent to restrict the district court's traditional powers, that provision should be construed so as to preserve that court's usual trial management role. See In re Atl. Pipe Corp., 304 F.3d 135, 142 (1st Cir. 2002).

C. The District Court's Dual-Jury Order Was Supported By "Good Cause" Within the Meaning of Section 3593

Not only was the district court entitled to consider whether dual juries were appropriate at the outset of the trial, here it based its order soundly on "good cause" within the meaning of § 3593.[14] The district court's good cause determination was based on a combination of three factors: First, the dual-jury order was a product of the district court's careful weighing of several trial management concerns. It was faced with numerous conflicts

[14] The First Circuit held that the district court possessed no discretion to consider "good cause" prior to trial under § 3593, and accordingly did not reach the issue of whether the good cause provision was satisfied.

between and among the two capital and three non-capital defendants, including irreconcilable defenses between the capital defendants and Bruton issues. Green I, 324 F. Supp. 2d at 324-326. The court also cited the unmanageability of a trial involving more than two defendants, given that the racketeering conspiracy is alleged to have spanned sixteen months and involved the five defendant co-conspirators as well as more than twenty unindicted co-conspirators. Id. at 327 n.23.

Second, the district court based its good cause determination additionally upon its concerns about fairness arising from the unique problems of selecting a death-qualified jury in Massachusetts. Green II, 343 F. Supp. 2d at 35. Because of the demographics of the jury pool, death qualification likely would result in the African-American petitioners facing all-white juries.[1/] Id. at 33. Moreover, the court recognized that death-qualifying the guilt jurors would present daunting problems for the prospect of a fair trial in this phase, as recent social science research indicates that these jurors would be significantly more conviction-prone than jurors who are not death-qualified. Id. at 35.

Third, the district court took into account in its good cause analysis the fact that the defendants waived any rights that may have accrued to them. The defendants had the right to object to the discharge of the jury for anything less than manifest necessity. See United States v. Jorn, 400 U.S. 470, 484-85 (1970). The court recognized that a defendant "may benefit from being able to appeal at sentencing to the 'residual doubts' of the same jurors who found him guilty," and went on to note that "in any event, even if there is an advantage that could accrue to the defendant with a unitary system, these defendants have chosen to waive it." Green II, 343 F. Supp. 2d at 31 n.11 (citing Lockhart, 476 U.S. at 181). In sum, the district court's dual-jury order satisfied both the procedural and substantive requirements of the good cause exception set forth in § 3593.

[1/] See n.3, supra.

Conclusion

The cert-worthy elements of the First Circuit's decision are multifold and compelling. Its grant of mandamus flouted Supreme Court precedent as to the jurisdictional bases for and substantive requirements of mandamus law, raised questions concerning the limits of mandamus jurisdiction that require clarification by this Court, and permitted the erroneous vacation of the district court's dual-jury order.

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Dated: August 10, 2005

APPENDIX

United States Court of Appeals
For the First Circuit

No. 05-1014

UNITED STATES of America,
Appellant,

v.

Darryl GREEN et al.,
Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

No. 05-1151

In re United States,
Petitioner.

PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Nancy Gertner, U.S. District Judge]

Before

Selya, Lynch and Lipez,

Circuit Judges.

Steven L. Lane, Attorney, Appellate Section, Criminal Division, U.S. Dep't of Justice, with whom Michael J. Sullivan, United States Attorney, Theodore B. Heinrich and Lori J. Holik, Assistant United States Attorneys, were on brief, for appellant.

Max D. Stern, with whom Randolph Gioia, Elizabeth Billowitz, Sarah Jennings Hunt, William Brennan, and Brennan, Trainor, Billman & Bennett, LLP were on brief, for appellee Darryl Green.

Max D. Stern, with whom Patricia Garin, Kenneth M. Resnik, Jeffrey Wiesner, Stern, Shapiro, Weissberg & Garin, LLP, David P. Hoose, and Katz, Sasson, Hoose & Turnbill were on brief, for appellee Branden Morris.

John H. Cunha, Jr., with whom George F. Gormley, Christie M. Charles and George F. Gormley, P.C. were on brief, for appellee Jonathan Hart.

John H. Cunha, Jr., with whom Stephen Super and Cunha & Holcomb, P.C. were on brief, for appellee Edward Washington.

Judith H. Mizner on brief for Federal Defender Office, amicus curiae.

May 12, 2005

SELYA, Circuit Judge. The district court, presiding over a complex multi-count, multi-defendant capital case, issued a pretrial order calling for the empanelment of two separate juries: one to determine guilt and the other, totally different in composition, to determine whether to impose the death penalty. Before us, the government asserts that the Federal Death Penalty Act (FDPA) forbids this binary course of action. We conclude that the district court's unprecedented order presents a basic, previously undecided question of substantial public importance and, accordingly, entertain the government's petition for advisory mandamus. Exercising that jurisdiction, we proceed to correct and countermand the district

court's erroneous interpretation of the FDPA.

I. BACKGROUND

In 2003, a federal grand jury sitting in the District of Massachusetts charged five men in a seventeen-count superseding indictment. The golconda of charges included racketeering, 18 U.S.C. § 1962(c); racketeering conspiracy, *id.* § 1962(d); murder in aid of racketeering, *id.* § 1959(a)(1); and conspiracy to commit murder in aid of racketeering, *id.* § 1959(a)(5). Four of the five defendants--Darryl Green, Branden Morris, Jonathan Hart, and Edward Washington--are parties to this proceeding. We focus exclusively on them.

The indictment alleged that the foursome were all members of the Esmond Street Posse, variously described as a Boston street gang or criminal enterprise, which was engaged in peddling marijuana and crack cocaine. Count Sixteen of the indictment charged Green and Morris, but not Hart or Washington, with the murder of one Terrell Gethers in aid of racketeering. Under the controlling statute, 18 U.S.C. § 1959(a)(1), that was a capital charge, carrying a potential penalty of death for the two affected defendants.

In response to a flurry of severance motions, *see* Fed.R.Crim.P. 14, the district court ruled that the capital defendants should not be tried together. *United States v. Green*, 324 F.Supp.2d 311, 324-25 (D.Mass.2004) (*Green I*). Relatedly, the court decreed that Hart would be tried with Green and that Washington would be tried with Morris. *Id.* at 326-28. These rulings brought to the fore a concern previously voiced by the non-capital defendants, Hart and Washington, who had posited that it would be unfair to force them to trial before a death-qualified jury.

We pause to place this concern into proper perspective. The Supreme Court has held that, in a capital case, the government may exclude from jury service those individuals whose personal opposition to the death penalty is such that it would prevent or substantially interfere with their ability to apply the law. *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985).

The process of winnowing out such conscientious objectors in jury selection is known as death-qualification.

A capital case potentially involves two separate trial phases. In the first phase, the jury determines whether the capital defendant is guilty of the crime(s) charged. If the defendant is convicted of a capital offense, a second proceeding ensues to determine whether that offense, under the circumstances of the case, warrants the death sentence. As a single jury normally hears both the guilt and penalty phases, death-qualification occurs as part of the original jury empanelment.

The defendants in this case insist that the process of selecting a single death-qualified jury to consider both the guilt and penalty phases has the correlative effect of putting a jury in the box that will be more prone to convict. To support this notion, the defendants proffered below statistical evidence purporting to indicate that African-Americans were significantly underrepresented in the local jury venire and that death-qualification would further reduce the possibility that any African-Americans--a group more likely to oppose the death penalty than non-African-Americans--would be able to serve on the jury. The defendants also tendered statistical evidence indicating a similar, though less pronounced, effect as to potential female jurors. The defendants then submitted studies purporting to show that death-qualified jurors are significantly more likely to convict than non-death-qualified jurors. Hart and Washington argued that these perceived consequences of death-qualification were particularly unfair as applied to defendants who were not themselves facing the death penalty.

In responding to these plaints, the district court conceded that the defendants (including the non-capital defendants) had no constitutional entitlement to a non-death-qualified jury. *See Green I*, 324 F.Supp.2d at 330 (citing *Buchanan v. Kentucky*, 483 U.S. 402, 107 S.Ct. 2906, 97 L.Ed.2d 336 (1987)). The court, however, did not stop there; it viewed the defendants' importunings as raising a case management issue within the realm of trial court discretion. *Id.*

Noting the concerns enumerated by the non-capital

defendants along with the potential strain on judicial resources that would accompany a further proliferation of the number of trials needed, the court devised two potential solutions and invited briefing on them. One entailed selecting a single jury (including the maximum number of alternates) for each trial, but deferring death-qualification until after the guilt phase had concluded. If a capital conviction ensued, the court would then attempt to death-qualify the jury before the penalty phase began and, if the number of remaining jurors and alternates fell below the requisite twelve, would discharge that jury and empanel a new, death-qualified jury exclusively for the penalty phase. *Id.* at 331. The second proposal contemplated selecting two distinct juries at the outset, one (non-death-qualified) to hear the guilt phase and the other (death-qualified) to hear the penalty phase. *Id.*

In the briefing that followed, the government denigrated both options and the defendants lobbied for the second. On November 3, 2004, the district court ordered two juries empaneled for each of the scheduled trials (one to adjudicate guilt and the second, if needed, to fix the nature of the penalty). *United States v. Green*, 343 F.Supp.2d 23, 25 (D.Mass.2004) (*Green II*). The court determined that the applicable provision of the Federal Death Penalty Act, 18 U.S.C. § 3593(b), did not require a unitary jury. *Id.* Even if it did, the court held, the defendants were entitled to waive the requirement. *Id.*

The government appealed this order and filed a protective petition for a writ of mandamus under the All Writs Act, 28 U.S.C. § 1651(a). We turn first to the jurisdictional question and then to the merits of the lower court's order.

II. APPELLATE JURISDICTION

The government's roadmap to review traces several possible avenues through which our jurisdiction may attach. We can entertain an interlocutory appeal, the government says, because the order appealed from is a collateral order, that is, an order that conclusively determines an important legal question, which is completely separate from the merits of the underlying action and is effectively unreviewable by means of a archetypical end-of-case appeal. *See,*

e.g., *Rhode Island v. U.S. EPA*, 378 F.3d 19, 25 (1st Cir.2004) (noting circumstances in which interlocutory orders are immediately appealable under the collateral order doctrine); *In re Nineteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig.*, 982 F.2d 603, 608-09 (1st Cir.1992) (similar); *see also Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-47, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949).

We view the use of the collateral order doctrine as problematic in the circumstances of this case. This court has been wary of creating running room for back-door attempts to evade the longstanding rule that appeals by the government in criminal cases must be specifically authorized by statute. *See United States v. Watson*, 386 F.3d 304, 307-08 (1st Cir.2004); *United States v. Kane*, 646 F.2d 4, 5-7 (1st Cir.1981). This wariness arises, in part, because of a realization that criminal matters are different--and special concerns counsel against permitting government appeals in criminal cases under the collateral order doctrine. *See United States v. Horn*, 29 F.3d 754, 768- 69 (1st Cir.1994). Among them are "speedy trial and double jeopardy concerns." *Id.* at 768; *see also United States v. McVeigh*, 106 F.3d 325, 330-32 (10th Cir.1997) (per curiam) (citing *Horn* and noting that the "principal prudential bases are the avoidance of undue delay, and the avoidance of harassment" (citations omitted)).

At a bare minimum, then, allowing a government appeal to go forward by way of the collateral order doctrine in a criminal case requires both that "the conditions of the collateral order doctrine are satisfied, and [that] the prudential concerns that traditionally militate against allowing the government to appeal in a criminal case favor, or are at least neutral in respect to, the availability of a government appeal." *Horn*, 29 F.3d at 769. This court has found such concerns overcome only on rare occasions, such as where, prior to the entry of the order appealed from, guilt has been determined, sentence imposed, "and no prospect of piecemeal litigation endures." *Id.* at 768-69. Because it is arguable how these prudential concerns cut in this case, we question whether an appeal from a dual jury order in a criminal case comes within the narrow purview of the collateral order doctrine. This doubt is all the more profound because of our

uncertainty about whether an order affecting sentencing procedure can be considered "completely separate" from the merits of the underlying action. *See Sell v. United States*, 539 U.S. 166, 176, 123 S.Ct. 2174, 156 L.Ed.2d 197 (2003) (permitting collateral appeal in criminal case when issue was wholly distinct from "questions concerning trial procedures"); *McVeigh*, 106 F.3d at 328, 332 (holding order barring victim-impact witnesses from observing guilt phase of capital trial not sufficiently separate from merits of case); *United States v. Patterson*, 882 F.2d 595, 599 (1st Cir.1989) (holding that the "sentencing process ... is an integral aspect" of a criminal case and "is not in any sense independent of the main course of the prosecution" (citations and internal quotation marks omitted)).

In the final analysis, we need not definitively resolve the appealability question. Review is available, in our discretion, by way of mandamus. We explain briefly.

Broadly stated, there are two types of mandamus. The more common is supervisory mandamus. *See, e.g., In re Atlantic Pipe Corp.*, 304 F.3d 135, 139-40 (1st Cir.2002); *Horn*, 29 F.3d at 769 & n. 19. That strain of mandamus generally is limited to situations in which the party seeking the writ has a clear entitlement to relief, yet is threatened with irreparable harm should that relief be delayed or deferred. *See, e.g., In re Sterling-Suárez*, 306 F.3d 1170, 1172 (1st Cir.2002); *In re Cargill, Inc.*, 66 F.3d 1256, 1260 (1st Cir.1995). The defendants argue that neither requirement is met here--and they are probably correct with respect to the second requirement.

The government suggests that it shares an interest with the public at large in seeing that the courts properly apply the FDPA--an interest that would be irreparably harmed if the district court proceeded with dual juries despite a contrary statutory command. This suggestion lacks force. If a blow to the public interest caused by a court's erroneous interpretation of a statutory provision were to constitute irreparable injury, the bar would be set so low as to render the requirement superfluous. As Justice Rehnquist wrote, "to issue a writ of mandamus under such circumstances would undermine the settled limitations upon the power of an appellate court to review interlocutory orders." *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655,

661, 98 S.Ct. 2552, 57 L.Ed.2d 504 (1978) (plurality op.) (citation and internal quotation marks omitted).

The second type of mandamus--known as advisory mandamus--is more apt in the circumstances at hand. Mandamus, in any form, is an extraordinary remedy, but advisory mandamus is available only in a tiny subset of cases. Such cases are those that present novel questions of great significance which, if not immediately addressed, are likely to recur and to evade effective review. *Horn*, 29 F.3d at 769. The aim of advisory mandamus, then, is to settle substantial questions of law in circumstances that "would assist other jurists, parties, [and] lawyers." *Id.* at 770. To obtain relief under this species of mandamus, the petitioner does not need to show irreparable harm. *See Atlantic Pipe*, 304 F.3d at 140.

This case lends itself to an application of the advisory mandamus doctrine. The district court's interpretation of section 3593(b) is unprecedented, and it hardly needs explaining why proper death penalty procedure is of great importance to the administration of justice. If the propriety of the district court's interpretation is not evaluated here and now, it would very likely evade review. On the one hand, if successive juries convict and then impose the death penalty, the government will not be able to appeal this favorable verdict, *see United States v. Moran*, 393 F.3d 1, 12 (1st Cir.2004), and the defendants, having urged the district court to abandon a unitary jury in favor of dual juries, could not be heard to complain about this procedural innovation, *see United States v. Angiulo*, 897 F.2d 1169, 1216 (1st Cir.1990) (holding that a criminal defendant cannot complain of invited error). On the other hand, if the first jury acquits or the second jury declines to impose capital punishment, the defendants will have no incentive to appeal and double jeopardy principles will prevent the government from doing so. *See Watson*, 386 F.3d at 308; *see also Sattazahn v. Pennsylvania*, 537 U.S. 101, 106, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003) (noting that "the Double Jeopardy Clause [applies] to capital-sentencing proceedings where ... the prosecution [must] prove certain statutorily defined facts beyond

a reasonable doubt to support a sentence of death").[1/]

To cinch matters, the question will almost certainly recur. There is a longstanding belief in certain quarters, shared by the defendants in this case, that an accused's guilt or innocence is likely to be judged less harshly by a non-death-qualified jury. Indeed, a federal district court in Texas already has relied on the procedural innovation implemented in this case as precedent for issuing a similar order in a different capital case. *See United States v. Williams*, 400 F.3d 277, 282 & n. 4 (5th Cir.2005) (per curiam) (vacating district court's order). Consequently, we deem this case an appropriate candidate for the exercise of our advisory mandamus authority.

III. ANALYSIS

The district court's primary justification for its dual jury order rests with its interpretation of the relevant section of the FDPA. The court concluded that 18 U.S.C. § 3593(b) permits a court to decide, *before trial commences*, that good cause exists to discharge the original jury once it has adjudicated the defendant's guilt and then empanel a new jury for the penalty phase. *Green II*, 343 F.Supp.2d at 30; *Green I*, 324 F.Supp.2d at 331. As a secondary ground, the court held that if the statute does require a unitary jury to be empaneled at the outset of the trial, the defendant may unilaterally waive that requirement. *See Green II*, 343 F.Supp.2d at 30- 31; *Green I*, 324 F.Supp.2d at 331-32.

18 U.S.C. § 3593(b) provides that if a defendant is found guilty or pleads guilty to a capital offense, there "shall" be a separate sentencing hearing. *Id.* The statute further provides that "[t]he hearing shall be conducted before the jury that determined the defendant's guilt." *Id.* § 3593(b)(1). The statute proceeds to carve out a series of exceptions. These contemplate that the penalty phase may be

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[1/] To be sure, a defendant might be able to test, by an end-of-case appeal, an order *refusing* to constitute dual juries. However, that is not the type of order with which we are confronted.

conducted before a jury empaneled for that purpose alone if--and only if--one of four circumstances obtains:

> (A) the defendant was convicted upon a plea of guilty;
> (B) the defendant was convicted after a trial before the court sitting without a jury;
> (C) the jury that determined the defendant's guilt was discharged for good cause; or
> (D) after initial imposition of a sentence under this section, reconsideration of the sentence under this section is necessary...

Id. § 3593(b)(2). Finally, the statute provides that the penalty phase may be tried "before the court alone, upon the motion of the defendant and with the approval of the attorney for the government." *Id.* § 3593(b)(3).

The question before us concerns the proper interpretation of section 3593(b)(2)(C). The government argues that this is a narrow jury-discharge provision that only comes into play if, *after a finding of guilt*, good cause to discharge the original jury arises. The defendants argue that this is a broader, more malleable provision, one that should be construed against the backdrop of a trial court's extensive case management powers. On this basis, the defendants exhort us to hold that section 3593(b)(2)(C) requires only that the discharge of the guilt phase jury must occur before a new penalty phase jury is empaneled. As a necessary corollary of this interpretation, the defendants reason that the district court may decide at any time--even in advance of trial--that it will discharge the guilt phase jury for what it deems to be good cause and empanel a new jury for the penalty phase.

In mulling the validity of these competing claims, we start with the text of the statute. *See Sepulveda v. United States*, 330 F.3d 55, 64 (1st Cir.2003). Section 3593(b)(2)(C) says that a new penalty phase jury will hear the case if "the jury that determined the defendant's guilt was discharged for good cause." That phrasing tells us a great deal about Congress's intent. The use of the word "determined," in the past tense, makes clear that the phrase "discharged for good cause" refers to discharge for events arising *after* the guilt phase has been concluded. *See Jones v. United States*,

527 U.S. 373, 418, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999) (Ginsburg, J., dissenting) (opining that "[d]ischarge for 'good cause' under § 3593(b)(2)(C) ... is most reasonably read to cover guilt-phase ... juror disqualification due to, *e.g.*, exposure to prejudicial extrinsic information or illness"); *see also id.* at 381, 119 S.Ct. 2090 (majority op.) (expressing agreement with dissent's interpretation of the phrase "good cause"); *Williams*, 400 F.3d at 282. This makes perfect sense: jurors who originally were qualified to sit may, by some untoward exposure or affliction, become incapacitated after the guilt phase ends but before the penalty phase ends so that a properly empaneled jury that has determined guilt will not be able to continue to serve.

The structure of a statute often informs its text. *See Plumley v. S. Container, Inc.*, 303 F.3d 364, 369 (1st Cir.2002); *United Techs. Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, 99 (1st Cir.1994). Here, the structure of section 3593(b) reinforces the reading suggested by its plain language. The default rule, expressed in subsection (b)(1), is that the jury that determines the guilt phase of a federal capital case shall also serve as the jury that determines the penalty phase. That provision is set forth first, in mandatory language and without condition. Subsection (b)(2) spells out four exceptions to the default rule of subsection (b)(1). That subsection is conditional; it directs that a new jury shall be empaneled for the penalty phase "if" one of four situations arises.

The common denominator among these four exceptions is that they all appear to represent situations in which it is either impossible or impracticable to apply the default rule of a unitary jury. This is unarguably true of subparagraphs (A) and (B); each of those subparagraphs deals with a situation in which guilt is not determined by a jury at all. That is also readily apparent with respect to subparagraph (D). The vast majority--if not all--of situations requiring the reconsideration of an imposed sentence will be those that occur when direct or collateral review has identified, months or years later, some defect in the original sentencing proceeding. Assuming that a jury participated in the original proceeding, it would have been long since discharged and recalling it would, for a variety of reasons, be infeasible.

Structurally, this leads to the conclusion that subparagraph (C) should be read as referring to those situations in which empaneling a fresh penalty phase jury is unavoidable because of some exigency associated with, or arising *after*, the determination of the defendant's guilt. This is the most natural (and, therefore, the favored) reading of the statute. So construed, subsection (b) presents a coherent, unified theme: a single, properly constituted jury will hear both phases of a federal capital trial unless circumstances definitively rule out that option.

The defendants read the statute differently. They invite us to find that the function of subsection (b)(2)(C) is to vest in the district court wide discretion as to whether one or two juries is appropriate in a particular capital case. In their view, Congress's choice of language was intended only to prevent two such juries from being sworn simultaneously. This is resupinate reasoning.

First and foremost, the defendants' reading contradicts the structure of the statute by turning the "good cause" language, clearly written in the form of an exception, into a threshold question to be posed at the time of the original jury empanelment in every capital case. Moreover, even if we were disposed to ignore the structure of the statute–which we are not--construing the language of subparagraph (C) as providing wide trial court discretion over the deployment of dual juries would require a linguistic contortion to reach a result that Congress could have accomplished much more simply and straightforwardly. Courts ought to construe statutes, whenever possible, "in a commonsense manner, honoring plain meaning, and avoiding absurd or counter-intuitive results." *United States v. Carroll*, 105 F.3d 740, 744 (1st Cir.1997) (internal citations omitted). The defendants' interpretation of the FDPA violates all three of these tenets.

Of course, there are circumstances, albeit few and far between, in which the apparent meaning of a statute must yield to other considerations. *See Greebel v. FTP Software, Inc.*, 194 F.3d 185, 192 (1st Cir.1999) ("Even seemingly straightforward text should be informed by the purpose and context of the statute."); *see also N.H. Hemp Council, Inc. v. Marshall*, 203 F.3d 1, 6 (1st Cir.2000)

(suggesting that there sometimes may be "sound reason for departure" from the apparent meaning of statutory language). The defendants strive to persuade us that this is such an instance--that the substantial discretion enjoyed by district courts in managing cases must inform our reading of the statute. To this end, they cite our decision in *Atlantic Pipe* for the proposition that Congress must speak in "clear and unmistakable" terms in order to "cabin the district courts' inherent powers." 304 F.3d at 142.

The defendants misread *Atlantic Pipe*, which squarely holds that a court's "inherent powers cannot be exercised in a manner that contradicts an applicable statute or rule." *Id.* at 143. This is just such a case: section 3593 limns a set of procedural rules applicable to federal capital cases. A brief glance at the other subsections, apart from subsection (b), makes this transparently clear. Subsection (a) mandates that the government "shall" provide pretrial notice of its intent to seek the death penalty and specify the aggravating factors that it intends to prove in support of that penalty. 18 U.S.C. § 3593(a). Subsection (c) delineates the procedures for how the parties must go about proving aggravating or mitigating factors. *Id.* § 3593(c). Subsection (d) sets forth a requirement for "special findings" identifying which aggravating and mitigating factors were proven. *Id.* § 3593(d). Subsection (e) memorializes the requirement that the factfinder "shall consider" whether the aggravating factors outweigh the mitigating factors in the case, and then (if a jury, by unanimous vote) "shall recommend" the penalty. *Id.* § 3593(e). Subsection (f) directs that the court "shall instruct the jury" that it cannot consider the race, color, religious belief, national origin, or gender of the defendant or the victim in deciding whether to apply the death penalty. *Id.* § 3593(f).

These provisions are of a piece with subsection (b) which, as previously described, specifies that the jury that determined guilt "shall" hear the penalty phase unless one of four narrow exceptions applies. All of these provisions employ mandatory language directing that particular rules of procedure "shall" be followed. This refutes any notion that Congress intended the district courts to retain discretion to disregard any or all of the prescribed rules. *See Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35, 118

S.Ct. 956, 140 L.Ed.2d 62 (1998) (explaining that statutory procedural rules couched "in terms of the mandatory 'shall' ... normally create[ ] an obligation impervious to judicial discretion").

The bottom line is this: where Congress has provided a specific panoply of rules that must be followed, the district court's discretionary powers simply do not come into play. Because this is such an instance, there is no reason to distort the plain meaning of the statutory text in an effort to preserve those powers. We hold, therefore, that the language of the exception in section 3593(b)(2)(C), ("the jury that determined the defendant's guilt was discharged for good cause ...") refers exclusively to a jury that has returned a guilty verdict in a federal capital case. *Accord Williams*, 400 F.3d at 282 (holding that the " 'good cause' language pertains to discharging a jury that has *already decided* the defendant's guilt" and that "[t]he provision does not allow a pretrial option for a bifurcated jury").

In a further effort to justify its order, the court below made an alternate holding: that "to the extent that § 3593 can be read to require a unitary jury, defendants [may] waive that requirement." *Green II*, 343 F.Supp.2d at 25. We reject that holding as well.

Section 3593 sets forth a set of general rules that govern all parties and the court itself. In those instances in which the statute does create rights that accrue to only one side or the other, the statute is explicit. For example, section 3593(c) specifies that the government "shall open the argument" and the defendant "shall [then] be permitted to reply." So too section 3593(b)(3), which makes specific reference to the ability of the parties jointly to waive certain of the rules (e.g., the right to a sentencing jury). The statute does not offer any such option with respect to the unitary jury rule of subsection (b)(1). The intentional inclusion of a waiver mechanism in one part of the statute persuasively indicates that the exclusion of such a waiver provision in another part of the same statute was intentional. *See Duncan v. Walker*, 533 U.S. 167, 173, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001) (describing as "well-settled" the proposition that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely

in the disparate inclusion or exclusion" (citation and internal quotation marks omitted)); *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 68 (1st Cir.2002) (explaining that "in harmony with the maxim *inclusio unius est exclusio alterius*, the explicit provision of remedies within a statute cuts sharply against the implication of [others]"). A federal capital defendant can no more waive the default rule of a unitary jury than the government can waive the rule that requires the court to instruct the jury to disregard the defendant's race.

If more were needed--and we doubt that it is--we would find it surpassingly difficult to believe that a statute that requires government approval of the defendant's motion to dispense with a sentencing jury would sub silentio permit a defendant to obtain *two* juries as of right. With respect to the deployment of a unitary jury in a federal capital case, "Congress intended to give no options, only commands." *Williams*, 400 F.3d at 282. As such, the district court's order cannot be sustained on the basis of its alternate holding.

Our odyssey is not yet completed. The government invites us to pass upon the validity of the district court's suggestion that it might defer death-qualification altogether until after it takes a verdict on the issue of guilt or innocence. *See Green I*, 324 F.Supp.2d at 331. We decline the invitation. Despite the nomenclature, advisory mandamus does not permit federal courts to issue advisory opinions. *See Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 705 (1st Cir.1994) ("Article III of the Constitution forbids courts from issuing advisory opinions or answering hypothetical questions."). The suggestion against which the government seeks protection is not embodied in an order and the defendants have thus far decried the concept. *See Green II*, 343 F.Supp.2d at 25. Consequently, there is no live controversy as to that suggestion.

III. CONCLUSION

Section 3593(b)(2) requires that, in a federal capital case, the jury that determines guilt also must determine the penalty unless one of four exceptions pertains. The exception relied upon by the lower court--"discharge[ ] for good cause," 18 U.S.C. § 3593(b)(2)(C)--requires that there be a dismissal of the jury for good

cause *after* it has returned a verdict in the guilt phase of the trial. The district court's order is incompatible with our reading of this statute.

We are not unmindful that the FDPA, as written, may complicate the trial of mixed capital and non-capital charges. But our task is to attempt, as best we can, to follow Congress's prescription, not to endeavor to improve upon it. The Supreme Court has made it pellucid that a death-qualified jury constitutionally may hear and determine non-capital charges, at least where there are "significant interests" in trying a non-capital defendant jointly with a defendant who is facing a capital charge. *See Buchanan*, 483 U.S. at 420, 107 S.Ct. 2906. At the same time, this language cannot be read to provide the government with an absolute entitlement to joint capital/non-capital trials whenever it pleases. Thus, we are confident that the district court, armed with the discretion to sever charges and defendants, will be able to ensure fundamental fairness in the trial of such mixed cases.

We need go no further. Inasmuch as the central issue presented in this case is novel, of great importance, likely to recur, and otherwise apt to evade review, we grant the government's petition for a writ of mandamus, vacate the dual jury order, and remand the case for further proceedings consistent with this opinion.

So Ordered.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)
	) CRIMINAL. NO. 02-10301-NG
v.	)
DARRYL GREEN, JONATHAN HART, EDWARD WASHINGTON, BRANDEN MORRIS, and TORRANCE GREEN, Defendants.	)

GERTNER, D.J.:

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)	
	)	CRIMINAL. NO. 02-10301-NG
v.	)	
	)	
DARRYL GREEN,	)	
JONATHAN HART,	)	
EDWARD WASHINGTON,	)	
BRANDEN MORRIS, and	)	
TORRANCE GREEN,	)	
Defendants.	)	

GERTNER, D.J.:

MEMORANDUM AND ORDER
RE: SEVERANCE/BIFURCATION OF GUILT AND PUNISHMENT
July 7, 2004

I. INTRODUCTION

Virtually all of the parties in the instant case--including the government--have argued that severance is appropriate as to either specific defendants or specific counts. The grounds vary: There are the claims one might find in any case with multiple defendants, for example, that severance is required by *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), because of admissions by one or more defendants, or that it is warranted under Fed. R.Crim. Pro. 14 because of mutually antagonistic defenses. But there are also claims unique to the facts of this case and to the severe penalty the government seeks: This is a racketeering case and one of the racketeering acts alleged is a murder, which carries a potential death penalty as to two of the defendants.

The Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962, which dates to 1970 was enacted in order to fight organized crime, and specifically, to dilute its power by crippling its financial base. *See* Organized Crime Control Act of 1970, Pub.L. No. 91-452, 84 Stat. 922-923 (Statement of Findings and Purpose). Within the past decade, however, RICO has been used to prosecute urban street gangs, whose financial base was allegedly the distribution of drugs. The choice of charge is significant: A RICO prosecution enables the government to introduce the "bad acts" of codefendants, which would arguably not be admissible otherwise, and in this case also provides the basis for the government to seek the federal death penalty.

The government alleges that the five defendants were members of the "Esmond Street Posse" (hereinafter "Esmond Street") racketeering enterprise, an enterprise whose goal was to engage in the sale of crack cocaine and marijuana, to seek to prevent others from interfering with their sales, and specifically, to carry on a violent dispute with a rival gang, the Franklin Hill Giants. That dispute allegedly led to a number of murders and attempted murders during a one year period in 2000 and 2001.

The defendants claim that there is no basis for a RICO indictment, and that the government has inappropriately strung together a series of acts committed at different times, by different persons, for different motives, all to the detriment of the defendants. Moreover, they argue that the government has no reasonable expectation that the several acts alleged in the indictment comprise acts in furtherance of an Esmond Street racketeering enterprise, because of Judge Wolf's findings in *United States v. Modlin*, 01-cr-10314-MLW. In *Modlin*, a drug distribution indictment in which three of the defendants here were named (along with others), the Court at sentencing rejected the allegation that anything like an Esmond Street conspiracy existed. Esmond Street, the Court concluded, involved nothing more than a group of people who hung out together in the same geographical

area, and dealt drugs independently of one another.[1/]

RICO also provides the basis for the government to seek the federal death penalty, which complicates the case still further. Count Sixteen alleges that Branden Morris ("Morris") and Darryl Green[2/] killed Terrell Gethers ("Gethers") "for the purpose of maintaining and increasing position in the Enterprise, which was an Enterprise engaged in racketeering activity." The defendants will first be tried before a jury to determine their guilt or innocence, and if convicted, tried in a separate proceeding to determine the punishment. The punishment jury will have to be "death-qualified"--that is questioned at voir dire regarding attitudes toward the death penalty. The government is permitted in a capital case to strike for cause any potential juror whose views about the death penalty "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985); *Witherspoon v. Illinois*, 391 U.S. 510, 520, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

Defendants Branden Morris and Darryl Green claim that they cannot be tried together in either the guilt or the punishment phase because, among other things, each claims the other is responsible for the shooting. The non-death penalty defendants, Jonathan Hart ("Hart") and Edward Washington ("Washington") seek severance from the death penalty defendants for a number of reasons, including that they will be prejudiced if their jury is

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[1/] Judge Wolf made this finding on May 20, 2003, at the sentencing hearing of three defendants, Modlin, Britt, and King. Although these defendants had pled guilty to Count One alleging conspiracy to distribute cocaine base (under 21 U.S.C. § 846), at sentencing Judge Wolf determined that the overall drug quantity sold by each defendant would not be attributed to the other defendants because of the government's failure to prove that a conspiracy existed. *See Derman v. United States*, 298 F.3d 34 (1st Cir 2002). Instead, Judge Wolf attributed the drug weight to each defendant based on direct sales or the sales of which the defendant aided or abetted.

[2/] I will use the full names of Darryl Green and his codefendant Torrance Green in this memorandum, to distinguish them.

death-qualified, and that joinder with the death-qualified defendants will needlessly slow the trial of their cases.

If I were to adopt the government's position, I would try at least four of the defendants together (all but Torrance Green, whose statements all parties agree raise *Bruton* problems) and then, if the capital defendants are convicted, hold individual penalty phase proceedings for Darryl Green and Morris before the same jury that decided guilt. If I were to adopt certain defendants' positions, I would sever nearly everyone and conduct as many as seven separate trials.[3/]

I adopt neither side. I have serious doubts as to whether a joint trial of the sort the government envisions will in fact promote judicial economy let alone be remotely fair or constitutional. At the same time, the defendants' proposal is needlessly complicated, and, as I describe below, may well be unfair to some of the defendants. As per my June 2, 2004, order,[4/] Darryl Green and Jonathan Hart will be tried on January 10, 2005. My inclination at this point is that Branden Morris and Edward Washington be tried together on April 11, 2005, but as is discussed below, I will revisit their joinder following the completion of the Darryl Green/Hart trial. Torrance Green will be tried on July 11, 2005.

II. BACKGROUND

On September 17, 2003, a superceding indictment was

[3/] In order to more clearly express questions of efficiency, I will refer to the punishment proceeding of a death penalty defendant's trial as a separate "trial." I do so solely for the purpose of making calculations and comparisons

[4/] I issued a procedural order on June 2, 2004, severing the trials, and setting deadlines. I amended the order on June 28, 2004, to the extent that I opened one issue for reconsideration--death-qualification of the guilt jury as well as the punishment jury. I continue to defer that issue for further briefing, along with the joinder of Morris/Washington in a single trial and the severance of the counts. In other respects, this memorandum provides the factual and legal basis for the preceding severance orders.

returned against Hart, Darryl Green and Morris, along with Edward Washington and Torrance Green (hereinafter "Pending Indictment"). The government filed a Notice of Intent to Seek the Death Penalty pursuant to 18 U.S.C. § 3591-2 as to Darryl Green and Morris. Counts One through Three of the indictment in the above case charge defendants Darryl Green, Morris, Hart, Washington and Torrance Green with racketeering (18 U.S.C. § 1962(c)), racketeering conspiracy (18 U.S.C. § 1962(d)), conspiracy to murder, and murder in aid of racketeering (18 U.S.C. § 1959(a)(5)) during the period between June 2000 and September 2001. The manner and means of the enterprise included selling crack cocaine and marijuana in and around Esmond Street, Dorchester, notifying one another about a dispute with another gang, the "Franklin Hill Giants," and stashing and using firearms. Counts Four through Seventeen charge specific individuals with various assaults and firearms offenses.[2] As described above, the glue connecting these counts and these defendants is their common membership, so the government alleges, in the Esmond Street racketeering enterprise.

On the face of the indictment, some patterns can be

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[2] In Counts Four, Five, and Six, Torrance Green is charged with assault in aid of racketeering (18 U.S.C. § 1959(a)(3)), use of a firearm in relation to a crime of violence (18 U.S.C. § 924(c)), and possession of a firearm in furtherance of a crime of violence (18 U.S.C. § 924(c)).
In Counts Seven through Ten, Edward Washington is charged with assault in aid of racketeering (18 U.S.C. § 1959(a)(3)), use of a firearm in relation to a crime of violence (18 U.S.C. § 924(c)), and two counts (Nine and Ten) of possession of a firearm in furtherance of a crime of violence (18 U.S.C. § 924(c)).
Count Eleven charges Branden Morris with possession of a firearm in furtherance of a crime of violence (18 U.S.C. § 924(c)).
Counts Twelve and Thirteen charge Jonathan Hart with assault in aid of racketeering (18 U.S.C. § 1959(a)(3)) and use of a firearm in relation to a crime of violence (18 U.S.C. § 924(c)).
Counts Fourteen and Fifteen charge Jonathan Hart and Darryl Green with assault in aid of racketeering (18 U.S.C. § 1959(a)(3)) and use of a firearm in relation to a crime of violence (18 U.S.C. § 924(c)).
Counts Sixteen and Seventeen charge Darryl Green and Branden Morris with murder in aid of racketeering (18 U.S.C. § 1959(a)(1)) and use of a firearm in relation to a crime of violence (18 U.S.C. § 924(c)).

discerned.[6] Certain defendants are named in the overall racketeering enterprise at certain times. Morris and Hart are named in counts towards the end of the period, from March 13, 2001[7] (for Morris) and March 28, 2001 (for Hart), and extending to August 25, 2001 (Morris), and July 5, 2001 (Hart). Washington was allegedly involved at the beginning of that period, September 16, 2000, but was taken into custody on November 14, 2000; and the allegations against him consequently end there. Darryl Green is alleged to have been involved for a longer period--spanning from September 16, 2000 to August 25, 2001. He allegedly joined with Hart in the counts alleging an attempt to murder Anthony Vaughan (Counts Fourteen and Fifteen), and with Morris in the counts alleging the murder of Terrell Gethers (Counts Sixteen and Seventeen).[8]

A. Prior Indictments

Darryl Green, Morris, and Hart along with ten others, had been joined in an earlier indictment on August 29, 2001, before Judge Mark Wolf of this Court (*United States v. Modlin*, 01-cr-10314-MLW) (hereinafter "the First Modlin Indictment" or "Wolf case"), which alleged drug distribution. Count One of that indictment charged a conspiracy to distribute cocaine base between

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[6] Morris' counsel, by way of affidavit, suggests that three periods of violence can be discerned from the discovery so far--the first spurt of violence, from September 8 to 16, 2001, caused by "a lack of respect" (when one individual bumped into another and refused to apologize), the second in April of 2001, with no known motive, and the third on August 24, and 25, 2001, over a young woman. Affidavit of Patricia Garin, attached to Morris' Supplemental Memorandum in Support of Motion to Sever Count Eleven [docket # 165] filed June 18, 2004.

[7] As described above, Morris claims that there will be no proof that a firearm found under his bed in April of 2001 was part of the racketeering enterprise.

[8] In the government's Notice of Intent to Seek the Death Penalty, it alleges, as a non-statutory aggravating factor under 18 U.S.C. § 3593(a) that Darryl Green urged Washington to attempt to murder Richard Green and thereafter helped him to escape apprehension.

September 2000 and December 2001 (roughly comparable to the period in the pending indictment--June 2000 to September 2001). In addition, the First Modlin Indictment charged thirty counts of possession or distribution of the drug by individual defendants.

A First Superceding Indictment was returned on December 5, 2001 (hereinafter "*Modlin* indictment") against the same thirteen defendants (Hart, Darryl Green, Morris, and ten others) and one additional defendant. Everyone in the *Modlin* indictment, except for Hart, Darryl Green and Brandon Morris, pled guilty. The trials of Darryl Green, Morris, and Hart on the *Modlin* charges were continued until after judgment has entered in this case.

The two indictments--the *Modlin* indictment and the Pending Indictment--overlap in a number of respects. While the focus of the *Modlin* indictment was drug distribution, drug distribution is alleged here as among the racketeering acts.[2/] The substantive counts of the Pending Indictment focus on violent acts and gun possession allegedly in furtherance of the racketeering enterprise, issues not included in the *Modlin* case.

At the sentencing hearings before Judge Wolf, the government sought to attribute to all of the defendants a substantial quantity of drugs possessed or distributed by others in furtherance of the conspiracy alleged in the indictment. After an evidentiary hearing, in which the government called four witnesses, Judge Wolf found "no conspiracy has been proven by a preponderance of the evidence." He added: "The evidence ... does not prove a

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2/ Various substantive counts in the *Modlin* case correspond to several racketeering acts alleged in the pending indictment. Count Nine, charging that Hart possessed and distributed drugs on March 28, 2001, corresponds to Racketeering Act Four. Count Twenty-One, charging that Morris and two others possessed and distributed cocaine base on June 20, 2001, corresponds to Racketeering Act Six of the pending indictment. Count Twenty-Five, charging that Darryl Green possessed and distributed cocaine base on July 3, 2001, corresponds to Racketeering Act Seven. Count Twenty-Six, charging that Darryl Green possessed and distributed cocaine base on July 18, 2001, corresponds to Racketeering Act Eight.

conspiracy. The defendants did not have an agreement .... There was no hierarchy or sharing the profits or things like that. What there was was parallel activity in the same area."

B. Severance Motions

I will provide an overview of the positions of each of the parties before addressing each position in detail.

1. The Government's Position

The government takes the position that all four of the remaining defendants (Morris, Darryl Green, Hart, Washington) should be tried together before a single death-qualified jury, and if Morris and Green are convicted of Count Sixteen, a single penalty phase. To preserve the defendants' rights to an individualized punishment phase, the punishment jury would hear the case against one defendant, followed by the case against the other. All told, the trial will take 3-6 weeks, exclusive of jury selection and the penalty phase. (The government estimates that jury selection--assuming death-qualification-- could take as long as two to three weeks in addition.)[10/] Only Torrance Green would be tried alone.[11/] Thus, according to the government's theory, there should be three trials, at least one lasting months, before two juries.

2. Branden Morris' Position

Morris has moved to sever his trial from both the non-capital defendants and his capital codefendant, Darryl Green. In addition, Morris moves to sever Count Eleven, charging him with possession of a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c).

[10/] With multiple defendants and counsel, I think this is a substantial underestimate.

[11/] The government concedes that Torrance Green should be tried alone because of *Bruton* problems if the statements it intends to offer against Torrance Green are deemed admissible.

The Morris proposal then would involve the a) trial of Morris, b) trial of Green, c) penalty phase for Morris, if needed, d) penalty phase for Green, if needed, e) trial of Morris on Count Eleven, f) joint trial of Hart and Washington, and g) trial of Torrance Green. Under this proposal, there would be seven trials, before at least five juries.

3. Darryl Green's Position

Green seeks parallel relief--that he be tried separately from all others, but in addition, Green claims that Count Sixteen (the capital murder count) be tried separately from all other counts.

4. Hart and Washington's Position

Hart and Washington seek severance from Morris and Darryl Green (as well as from Torrance Green, which the government does not contest). According to their proposal, there should be a) a joint trial of Morris/Darryl Green, b) a penalty phase of Morris/Darryl Green if appropriate, c) a trial of Hart and Washington, and, d) a trial of Torrance Green. Their proposal would yield four trials before three juries.

III. LEGAL ANALYSIS

A. Standards

Under Rule 8(b) Fed. R.Crim. Pro. the government is entitled to join two or more defendants in a single indictment if they are alleged to have participated in "the same act or transactions or in the same series of acts or transactions, constituting an offense or offenses."[12] These acts or transactions

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[12] Rule 8(b) provides:
Joinder of Defendants. The indictment ... may charge 2 or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses. The defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count.

may be linked through an allegation of a pattern of racketeering activity, *see, e.g., United States v. Tashjian*, 660 F.2d 829 (1st Cir.1981), but only so long as that allegation is made in good faith and upon a factual basis. *United States v. Luna*, 585 F.2d 1, 4 (1st Cir.1978); *see also, United States v. Ong*, 541 F.2d 331, 337 (2d Cir.1976). Joinder is improper if the government lacks a "reasonable expectation" of proving the required connection.

Fed. R.Crim. Pro. 14, recognizes that there may be instances in which defendants, although appropriately joined under Rule 8, should nevertheless be severed in the discretion of the trial court.[IV] Rule 14 permits severance if "consolidation for trial appears to prejudice a defendant or the government." In that case the court may "order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires."

On the one hand, joint trials are often more efficient than individual trials, and avoid having victims and witnesses repeat the inconvenience and sometimes the trauma of testifying. Moreover, severed trials could "randomly favor the last-tried defendants who have the advantage of knowing the prosecution's case beforehand." *Richardson v. Marsh*, 481 U.S. 200, 210, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987). At the same time, Rule 14 directs the court to ask, in effect--at what price judicial economy?--particularly with respect to individual defendants. There is no question that joint trials, involving defendants with different degrees of culpability, can raise a substantial risk of prejudice, that evidence of a codefendant's wrongdoing might erroneously lead the jury to convict the defendant, that exculpatory evidence that would be available to a defendant tried alone may well be unavailable in a joint trial. *See Zafiro v. United States*, 506 U.S. 534, 539, 113 S.Ct.

[IV] Rule 14(a) provides:
Relief. If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires.

933, 122 L.Ed.2d 317 (1993).[19]

The determination of when potential prejudice reaches the threshold identified under Rule 14--the threshold requiring judicial intervention--is not an exact science. Predictably, the case law involves the appeal of the trial court's denial of severance. Concerns about judicial economy, most courts' abiding faith in limiting instructions, the government's good faith representations about what the evidence will be, usually trump the defendants' concerns about joint trials. Appellate review of lower court decisions to sever trials takes place under an "abuse of discretion" standard. *See United States v. Jones*, 10 F.3d 901, 908 (1st Cir. 1993). There is no way of determining what *actually* affected the guilty verdict. The defendants can only speculate and that speculation is rarely sufficient in the face of the trial court's considerable discretion in granting a motion to sever only when "there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence."

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[19] Indeed, social scientists have studied the impact on the jury of hearing about misconduct, even misconduct unrelated to the merits of the case, like a prior conviction, on the jury's ability to weigh evidence fairly against the defendant. They have described a "halo effect," meaning that once a juror hears about misconduct, he transmutes that bad act into evidence of a bad character, which deflects the jurors from fairly assessing the evidence. *See* Valerie P. Hans & Anthony N. Doob, Section 12 of the Canada Evidence Act and the Deliberations of Simulated Juries, 18 CRIM. L.Q. 235, 251 (1975-1976) (finding that the fact of the defendant's prior criminal record "permeates the entire discussion of the case, and appears to affect the juror's perception and interpretation of the evidence"); Anthony N. Doob & Hershi M. Kirshenbaum, Some Empirical Evidence on the Effect of S. 12 of the Canada Evidence Act Upon an Accused, 15 CRIM. L.Q. 88, 89-90 (1972-1973) (concluding that jurors are likely to consider information about a defendant's prior criminal record in determining guilt of the crime charged); Roselle L. Wissler & Michael J. Saks, On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt, 9 L. & Hum. Behav. 37 (1985) (finding that mock jurors were more likely to render a guilty verdict when told of a defendant's prior convictions). While some of these studies were conducted several years ago and involve Canadian juries, there is no question that the evidentiary limitations on the admissibility of prior convictions and bad acts, reflect similar concerns.

Zafiro, 506 U.S. at 539, 113 S.Ct. 933.[15]

The instant case stands in an unusual posture for two reasons. First, another judge of this Court has seen some of the government's evidence--albeit in truncated form in a sentencing proceeding and involving a similar but not identical indictment. He has made findings that surely reflect badly on a central pillar of the government's case, that the Esmond Street gang was a gang at all, much less a racketeering enterprise. Second, the standards for severance are necessarily leavened by the fact this is a death penalty case. The threshold for determining what constitutes prejudice and when the jury's ability to render a reliable verdict is compromised is necessarily lower than in the ordinary case. *See United States v. Perez*, 299 F.Supp.2d 38, (D.Conn. January 14, 2004) (granting severance based on evidentiary concerns "given the heightened need for reliability in a death penalty trial"); *People v. Keenan*, 46 Cal.3d 478, 500, 250 Cal.Rptr. 550, 758 P.2d 1081 (1988) (upholding denial of severance but recognizing that "[s]everance motions in capital cases should receive heightened scrutiny for potential prejudice.")

With these standards in mind, I consider the various severance motions.

B. The Significance of Modlin

Using Judge Wolf's findings in *Modlin* and the evidence

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[15] Given the stringent standard, the Supreme Court has recognized the difficulty of proving prejudice after severance has been denied:
Notwithstanding such assertions, the courts have reversed relatively few convictions for failure to grant a severance on grounds of mutually antagonistic or irreconcilable defenses. *See, e.g., United States v. Tootick, 952 F.2d 1078 (9th Cir.1991); United States v. Rucker*, 915 F.2d 1511, 1512-1513 (11th Cir.1990); *United States v. Romanello*, 726 F.2d 173 (5th Cir.1984). The **low rate of reversal may reflect the inability of defendants to prove a risk of prejudice in most cases involving conflicting defenses.**
Zafiro, 506 U.S. at 538, 113 S.Ct. 933 (emphasis added).

on which it was based, Morris maintains that it is not at all likely that the government will ever meet the foundational requirement -- a reasonable expectation of linking him (or indeed any of the defendants) in a racketeering enterprise, even the under rigorous standards of Rule 8(b). He maintains that the evidence will show that there was no drug enterprise,[16] and that even if there were an enterprise organized around drug distribution, the group did not

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[16] Judge Wolf found that there was no conspiratorial organization for the dealing of drugs. There was only "parallel activity." Indeed, in the Grand Jury, DEA task force agent Joao Monteiro adopted the prosecutor's description of the drug sales in the Esmond Street area as follows:

1. The sales involved "relatively small street level quantities." 2. The sellers "don't all share the same source."

3. It "is not a drug organization that's a hierarchical drug organization with one boss who's got the source of the drug supply and other people working for him." The sellers have "their own product" or "they're responsible for their own product."

4. The sellers "make their own money." Even those who share a common supplier, are "competing to make the sale" to make their own commission.

5. "It's less of a hierarchical organization than it is kind of like a shopping mall where there's each independent operator but they've got their place of business." They "protect their turf." "They look out for one another."

Grand Jury Testimony of Joao Monteiro, August 29, 2001, pp. 4, 35, 42-44.

One grand juror was so confused by evidence that the so-called gang sellers acted independently that he asked:

I'm having a hard time understanding if these people are in fact cooperating, are part of a cooperating group in terms of sales of drugs, why are the transactions in the same place at the same time with two different individuals? Can you explain that ... As an example, on 6/27 we have one--one transaction taking place between yourself and Williams, and then what appears to be an independent transaction taking place between Rabb and Brown, having both arrived at the same time. I'm just curious, why, if you went there together and these people are working together, are these things taking place sort of independent? Why wouldn't you buy everything from one person?

Id. at 41. Agent Montiero replied that the agents purchased from both individuals because they were "not going to let the crack go back out on the street" and to maintain their "good relationship" with the sellers. *Id.*

In addition, cooperating witness Sean Williams, an alleged Esmond Street member, testified before the Grand Jury, for example, that he sometimes bought his crack from Richard Green, an alleged Franklin Hill Giant. Grand Jury Testimony of Sean Williams, June 16, 2002, p. 8.

function as a continuing unit during the period of the indictment[17]

Morris distinguishes the instant case from *United States v. Flores*, 230 F.Supp.2d 138 (D.Mass.2002), and analogizes it to *United States v. Lacy*, 99 F.Supp.2d 108 (D.Mass.2000). In *Flores*, this Court found a gang to be "cohesive and hierarchical ... there were rules, assigned roles, a formal meeting structure, an initiation ritual, joint sources of supply, and the requirement that all who deal on the 'turf' pay into a 'fundle,' a form of tribute." 230 F.Supp.2d at 143 & n. 10. In *Lacy*, however, this Court noted that the "Castlegate Gang" lacked significant structure--it had "no formal hierarchy or chain of command ... the leadership was chosen very informally ... [they did] not wear specific colors or symbols ... there were no rules, no assigned roles or responsibilities." 99 F.Supp.2d at 113-14.

Moreover, Morris contends that even if there were an enterprise, there is no evidence that he had any part of it prior to August 25, 2001, the date of the Terrell Gethers murder. In fact, if the government were to show that an enterprise suddenly came into being on that date, and murder were a part of it, there is no basis to link that offense as part of the "same series of acts or transactions constituting an offense or offenses," and thus properly joined with the other counts. Finally, Morris challenges inclusion of Count Eleven with the others. Count Eleven charges possession of a firearm found under Morris' bed in April of 2001, a firearm Morris notes, that was never linked to any of the assaults or the murder charged in the instant indictment.

The government argues that what Morris is really claiming is not that the government is improperly joining disparate substantive charges with manufactured racketeering and conspiracy charges to bolster the former, but that the government cannot prove its charges at all. The government counters that it can prove that "an enterprise existed, that Morris was associated

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[17] *See* FN 6, *supra*.

with it, and that the conduct he is charged with was somehow related to the activities of the enterprise." Issues of proof, it suggests, are for trials, and not severance motions. True enough, except that the government must at the very least show a good faith basis for its RICO accusations since it opens the door wide to prejudicial evidence.

In *United States* v. *Luna*, 585 F.2d 1 (1st Cir.1978), for example, three defendants were charged with conspiracy to distribute heroin. They were also each charged with a substantive count of distribution of heroin--two defendants were charged with one sale in Count Two, and the remaining defendant was charged with a separate sale, which took place a month later, in Count Three. The defendants claimed that the conspiracy count had not been added in good faith, that it was used only to join otherwise unrelated substantive offenses. The First Circuit rejected the claim, concluding that the conspiracy count will not rectify otherwise improper joinder, where the count has been added in good faith, and a factual basis for it exists, joinder is permissible." According to the court, the separate defendant's admission that he got the heroin from one of the other two defendants sufficed. *Luna*, 585 F.2d at 4.

In *United States* v. *Ong*, 541 F.2d 331 (2d Cir.1976), the defendant Young was charged with 20 counts of bribery and participating in a conspiracy with the other defendants to bribe agents of the Immigration an Naturalization Service. Young claimed that the evidence showed that no conspiracy existed between him and his codefendants and that he should be severed from them. The court denied the motion, but granted a motion to acquit him of the conspiracy charge after trial. While the First Circuit questioned whether the conspiracy was alleged by the government in good faith, and found that it was "based on a novel and questionable theory of conspiracy," it nevertheless concluded that the government's evidence satisfied this standard. *Ong*, 541 F.2d at 337.

Likewise in *United States* v. *Turkette*, 656 F.2d 5 (1st Cir.1981), defendant Vargas was charged with four counts of mail

fraud based on arson-generated insurance claims and one count of RICO conspiracy. The indictment included thirteen defendants and nine counts--the RICO count allegedly tied the defendants together. At the close of the government's case, the court dismissed the RICO conspiracy count against Vargas. The jury convicted him of a single mail fraud count and he appealed, claiming, among other things, that the government included him in bad faith in the RICO count without a proper evidentiary foundation. The court held that the judgment of acquittal did not demonstrate bad faith; the defendant otherwise failed in his burden to show it. *Turkette*, 656 F.2d at 9.

In the instant case, the government argues that Judge Wolf's findings in *Modlin* are not apposite as to the issue of good faith. They were made in connection with a sentencing hearing, which was necessarily truncated and concerned the attribution of drug weight to each individual defendant under the relevant conduct provisions of the sentencing guidelines. U.S.S.G. § 1b1.3.

The government's argument is curious. First, Judge Wolf did not only find that the drugs distributed by the conspiracy could not be attributed to a given defendant, he found that there was no group, no structure, in effect, no conspiracy tying the defendants at all.[19] Second, he did so applying the minimal evidentiary standard of a sentencing hearing--a fair preponderance of the evidence. If the government cannot meet that minimal standard at sentencing, it is reasonable to wonder how it will be able to satisfy the "beyond a reasonable doubt" standard.

At the same time, the government is correct that Judge Wolf's findings do not bind me in this case, for the reasons suggested above--a truncated proceeding, a different indictment

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[19] Judge Wolf noted at the hearing: "The defendants did not have an agreement, among other things, and I didn't rely on this exclusively. There was no hierarchy or sharing of profits or things like that. What there was was parallel activity in the same area."

(although with some overlap), different defendants and counsel, a different standard of proof. But while not dispositive in this case, Judge Wolf's findings are surely important. They put this Court in a different position than many judges obliged to address severance issues before the litigation has begun. I have data that I can use to guide severance decisions--that there may be substantial defense arguments about the RICO "glue" linking these defendants, or the acts of which they are charged, that the links as between them may be more fragile than the government maintains. While I cannot conclude at this juncture that the government's RICO accusations were not brought in good faith based solely on the *Modlin* findings, I will consider those findings in resolving some of the severance issues, as I describe below.

For reasons of judicial economy, fairness, and manageability, I will link certain defendants together who are linked in time in terms of their temporal connection to Esmond Street or by virtue of their specific acts. I will seek to have the government pare down the evidence in the severed trials to focus more directly on the defendants who are being tried.[19] The resulting set of trials, in my judgment, will be both more efficient and more fair.

C. Severance of Darryl Green and Morris from Each Other

1. Bruton Issue

Morris claims that certain statements made by codefendant Darryl Green, which name Morris as a participant in the Gethers

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[19] In that respect, I would be doing what Judge Zobel attempted to do in *U.S. v. DeCologero*, 2003 WL 1538433 (D.Mass. March 21, 2003), vacated in part, 364 F.3d 12 (1st Cir. April 12, 2004) (reversing order postponing trial of certain racketeering acts because judge failed to make findings that she exhausted traditional alternatives to address trial's complexity, like severance of defendants and counts).

murder, raise questions under *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). *Bruton* requires a) severance of the implicated defendant, 2) joint trial where the prosecution does not use the confession or 3) a joint trial with a redacted confession. Wayne R. LaFave, Criminal Procedure, Vol. 4 § 17.2(b) (2d ed.2004).

The government alleges that both Darryl Green and Branden Morris fired shots at Terrell Gethers. Only one bullet struck him causing the fatal wound. Morris will say that there was only one shooter and that the shooter was Green. Darryl Green will say that there was only one shooter, and that it was Morris.

Darryl Green, however, allegedly made the following statements, which Morris argues create a *Bruton* problem:

Darryl Green told Homell St. Charles, post-arrest, "[they are] trying to make it seem like I did it--it was the young kid (Branden Morris)." (The co-operating witnesses have alleged that Branden Morris was the "kid" or the "young dude.") According to Homell St. Charles, Darryl Green also may have told him either "the kid was shooting back" or "the kid was strapped." However, it is unnecessary to evaluate these statements under *Bruton* because the government has announced that it does not intend to offer the testimony of Homell St. Charles concerning the post-arrest statements of Darryl Green.

The government does intend to introduce statements by Darryl Green to cooperating witness Kenie Smith on August 27, 2001, two days after the Gethers murder and during the alleged, ongoing racketeering conspiracy, as a statement of Darryl Green, supposedly admitting that the murder was in furtherance of the overall conspiracy. Darryl Green allegedly said to Kenie Smith on August 27, 2001, that after Terrell Gethers got out of Richard White's car and put on a Giants shirt "we was dumping revolvers." The "we," the government suggests, refers to Darryl Green and Morris. The admissibility of this statement does not depend on a *Bruton* analysis; it depends upon whether the predicate for

co-conspirator hearsay is met.[2/] At this juncture, I cannot draw a conclusion one way or the other. If the statements are admissible in a joint trial, as the government in good faith represents, they would hardly provide the basis for a severance under Rule 8(b).

2. Antagonistic Defenses

Quite apart from technical misjoinder arguments under Rule 8, Morris and Darryl Green also move under Rule 14, alleging prejudicial joinder as between them. In the ordinary course, the court is to grant severance "if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro v. United States*, 506 U.S. 534, 539, 113 S.Ct. 933, 122 L.Ed.2d 317 (1993). In a death penalty case, as described *supra*, concerns about reliability are heightened, particularly as to severance. *See, e.g., United States v. Bernard*, 299 F.3d 467, 475 (5th Cir.2002), *cert. denied* 539 U.S. 928, 123 S.Ct. 2572, 156 L.Ed.2d 607 (2003); *see also Perez*, 299 F.Supp.2d 38. There is no per se rule; plainly the degree of antagonism must be such that the jury will inappropriately infer that one or both are guilty. *United States v. Talavera*, 668 F.2d 625, 630 (1st Cir.1982).

As noted above, the defense maintains that ballistics evidence will suggest that there was only one shooter, not two. Green will say it was Morris; Morris will say it was Green. If the jury agrees that there is only one shooter, the defendants' claims are mutually exclusive, and unlike in *Zafiro*, a zero sum game. *See Zafiro v. U.S.*, 506 U.S. at 543, 113 S.Ct. 933, Stevens, J. concurring. ("I would save for another day evaluation of the prejudice that may raise when the evidence or testimony offered by one defendant is truly irreconcilable with the innocence of a codefendant.") *See also, State v. Kinkade*, 140 Ariz. 91, 680 P.2d

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[2/] Rule 801(d)(2). Judge Wolf's findings in the *Moallin* case, however, suggest that more of this issue should be pre-tried than usual, i.e. reviewed in advance of the selection of the jury, and prior to jeopardy attaching.

801, 803 (1984) (distinguishing "competing" from mutually antagonistic defenses"). Joinder, Justice Stevens noted, in a case involving mutually antagonistic defenses, may operate to reduce the burden on the prosecutor--by turning a defendant into a second prosecutor. Each side will do everything possible to convict the other defendant, as "defense counsel are not always held to the limitations and standards imposed on the government prosecutor." *United States v. Tootick*, 952 F.2d 1078, 1082 (9th Cir.1991).

The government counters that the evidence will show only a single bullet hit Gethers, but not that there was a single shooter. Moreover, even if there was only a single shooter, the government would argue the defendants were joint venturers or one aided and abetted the other.

The issue is not the position the *government* takes. The issue is whether a jury will be able to hear the opposing position--the defense theory--and reliably consider all positions. There is a considerable risk that each defendant, ably throwing pot-shots at the other, would make the government's case for it. Specifically, in the din, a juror could well say: "I cannot figure out who did the shooting, given the defendants' mutual accusations, but it doesn't matter. They were involved somehow and that is enough." That conclusion would redound to the government's benefit.

The trials of Darryl Green and Brendan Morris will be severed under Rule 14.

3. Joint Penalty Phase

An additional reason for severing Green and Morris involves the conduct of the penalty phase if Green and Morris are found guilty. The government anticipates a trial in which one defendant will appear before the jury--the same jury which found him guilty--in the punishment phase, followed by the second defendant in front of that same jury. The government contends that it will rely on a single statutory aggravating factor common to both defendants, which would have been litigated to a degree in

the guilt phase of the case-- that the defendants, in committing the murder of Terrell Gethers, knowingly created a grave risk of death to one or more persons in addition to the victim. The non-statutory factors it would rely on as to Darryl Green are his participation in the shootings of Richard Green and Anthony Vaughan, his lack of remorse, and victim impact statements. For Brandon Morris, the non-statutory factors would be victim impact evidence and his role in the arson murder of Shelby Caddell. The jury would not confuse the two, the government claims, since there are entirely different mitigating factors, and different victims. The government argues that since the defendant in the second punishment proceeding would obviously not have the right to cross examine witnesses in the first proceeding, they will not be able to effectively make mutually antagonistic arguments the way they might during the combined guilt phase.

The government profoundly underestimates the problems. The defense argues, quite forcefully, that in this case an aggravating fact for one defendant is a mitigating fact for another. Darryl Green suggests that he may argue in mitigation that prior to the present offense, he had a stable and loving family with parents, a brother and sisters who describe his otherwise exemplary life. Morris, on the other hand, may argue in mitigation that he has suffered throughout his life from childhood abuse or neglect and has been exposed to horrible violence and a lack of opportunities in his community, which made him vulnerable to the influence of someone older, like Darryl Green. In fact, virtually every argument for mitigation made by one defendant will be in effect an argument against mitigation as to the other defendant if that defendant cannot claim the same attribute.

Proceeding before the same jury would be even more problematic if, as they are likely to do, the defendants argue for mitigation by shifting blame to the other, or by arguing that they are not as worthy of death as their codefendant. Darryl Green points out that Morris may argue that his own (youthful) criminal conduct can be blamed on the (older and more mature) Green. If tried to the same jury, Darryl Green might argue that Morris' conduct was far more heinous than Darryl Green's, and focus on

the particularly gruesome arson murder (a non-statutory aggravating factor against only Morris).

Moreover, all of this could well occur in a classic trial by ambush. While the government has to give notice of aggravating factors, a codefendant does not. Indeed, these problems potentially rise above simple fairness and may raise Sixth Amendment confrontation issues and Eighth Amendment concerns about individualized treatment at the punishment phase.

What is more, the defendants have a compelling argument that the order of the punishment trials could be significant. As the second defendant and his counsel sit on the sidelines, the first will present evidence and make arguments that could drastically alter the context in which the second is judged before the same jury. Arguably, the decision-making process of the jury will have evolved without the second defendant's representation in the process. Whichever defendant is tried second would potentially suffer.

4. Conclusion

The problems of having the penalty trial of two defendants tried before the same jury add to my concerns regarding the joinder of Darryl Green and Morris during the guilt phase of the trial, and support my conclusion that these defendants must be severed in both phases.

I could follow the severed Morris and Green trials with a joint trial of the non-capital defendants Hart and Washington, followed by a trial of Torrance Green, for a total of six trials (if Morris and Green are found guilty), or defendants Hart and Washington could be joined--either together or as a pair-- with either Darryl Green or Morris. I now turn to that question.

D. Severance Of The Non-Capital Defendants From The Capital Defendants

The capital defendants and the non-capital defendants seek

a severance between the two groups, for a number of reasons including both judicial management and potential prejudice to all defendants.[21]

The government is correct that, as charged, the death penalty and non-death penalty cases are closely related. It is therefore different than cases such as *United States v. Maisonet*, 1998 WL 355414 (S.D.N.Y.1998), in which the court noted a danger of prejudice where "some of the crimes charged are murder, conspiracy to commit murder, and attempted murder, and where several of the defendants face the death penalty," and others are charged with far less serious offenses. 1998 WL 355415, *5. The judge there severed the trials into one with RICO defendants and another with non-RICO defendants--so that defendants who were charged only with narcotics offenses were not tried with defendants who were charged with crimes of violence.

The levels of culpability are not so clearly distinct here. The only reason that the charges against Hart and Washington are different from those against Darryl Green and Morris is that the shooting victims of Hart and Washington survived. The pending indictment, the government maintains, focuses on the relationship

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[21] The capital defendants argue most powerfully that if they are tried along with non-capital defendants, jurors may infer that because they have been chosen by someone (they may know it was by the government or speculate that it was by the Court) for the death penalty, and others have not, that they are more culpable than the non-capital codefendants.

While this argument is persuasive, I need not address it here because, as described below, my current intention is not to death-qualify jurors at the guilt phase. By structuring the proceedings in that way, any potential concern about Darryl Green or Morris becoming "target" defendants, is alleviated.

The non-capital defendants also make arguments based on the possibility of the guilt jury being death-qualified--that the jury selection process would cause delay, and that acts with which they are charged will take on special significance because they are part of the government's death penalty case against Darryl Green. (*See* FN. 22, *infra*.) These arguments are similarly moot if the guilt phase jury is not death-qualified.

between the RICO enterprise in which all the defendants allegedly participated and the assault and gun charges that flowed from it.

From that perspective, joining Hart and Washington together, and with either Morris or Darryl Green, makes sense. Indeed, the government suggests that I join both with Darryl Green, because the most serious charges against Hart and Washington are assaults in which Darryl Green was, allegedly, a participant.[22] It asserts that such a trial would involve roughly 50 witnesses, and that no fewer witnesses would be needed to try only Darryl Green and Hart, or only Darryl Green and Washington.

But the number of witnesses is not the only issue. A trial of the three defendants together would involve thirteen counts, and many more racketeering acts.

I have substantial concerns about the ability of the jury to keep the role of each defendant separate and distinct. I believe that there would be a very serious risk of juror confusion that would "prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro*, 506 U.S. at 539, 113 S.Ct. 933. In such a case, "Rule 14 gives the district judge wide authority to sever defendants, counts, or both, upon a showing of prejudice." *United States v. DeCologero*, 364 F.3d 12 (1st Cir.2004). Indeed, as the First Circuit noted in *DeCologero*, 364 F.3d at 24, "[t]here are potentially limits to the complexity that a jury can handle." It is true that the potential trial here is nowhere near the size of *United States v. Andrews*, 754 F.Supp. 1161, 1180 (N.D.Ill.1990), the case discussed by the Court in *DeCologero*. (*Andrews* involved 38 defendants and 175 counts.) But a trial need not be as large as *Andrews* threatened to be to create a fear of prejudice and justify severance, particularly where, as here, that severance has yet to

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[22] Hart is charged along with Darryl Green with assaulting Anthony Vaughan (Counts Fourteen and Fifteen). Washington is charged with assaulting Richard Green (Counts Seven and Eight). A non-statutory aggravating factor in the government's case against Darryl Green is that Darryl Green allegedly urged Washington to "attempt to assault" Richard Green and aided him in avoiding apprehension.

infringe on the government's ability to present all of relevant evidence it desires.[27]

I will join Darryl Green and Hart because they are formally charged together in the Vaughan counts. Darryl Green's role in Washington's alleged assault of Richard Green is less clear. He is not formally charged as a direct participant to aiding and abetting. The Green assault is alleged as a non-statutory aggravating factor in the vaguest of terms--that Darryl Green urged Washington "to attempt to murder Richard Green" and helped him to avoid apprehension. I cannot tell at this juncture that "urging" would be admissible in a joint Darryl Green/ Washington trial.

For all of the above reasons--case management, juror comprehension, judicial economy, not to mention fairness, severing Washington and leaving Darryl Green and Hart to be tried together is appropriate. Two defendants per trial, assuming Washington and Morris are also paired, will enable the court to better sort out evidentiary issues, to carefully evaluate the racketeering acts alleged, to limit them where appropriate according to the time period involved, and the specific defendants involved.[28]

In my initial procedural order, I ordered that Morris be

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[27] I will reserve for now any determinations about how such a severance might limit the government's ability to put forward racketeering acts or counts relating to defendants other than those in a specific trial. In *DeCologero*, the First Circuit noted that "[i]n principle, the district court could require that DeCologero be tried alone and solely upon the two RICO counts and the RAs [racketeering acts] applicable to him, severing all other defendants and counts for a future trial or trials" as long as those limitations are based on specific and adequate findings. 364 F.3d at 25.

My only conclusion at this stage of the proceedings is that a case with three of these particular defendants, with the particular charges they face, would be unmanageable. The parties will present arguments at a later date as to the evidentiary implications of Darryl Green/Hart and Morris/Washington trials.

[28] *See DeCologero*, 364 F.3d 12.

tried with Washington in April of 2005. I concluded that there was no danger of prejudice from a joint trial because the time of Washington's alleged participation is defined-- his role in the conspiracy ended in November 2000, when he was taken into custody. Likewise Morris, who has argued that his role in the enterprise did not begin until March 2001, can easily make that argument in a combined Morris/Washington trial.

However, on the eve of releasing this memorandum, the government has moved for a reconsideration of the Morris/Washington pairing. I defer that issue at present and leave open the possibility that Morris and Washington be tried separately. To the extent the motion for reconsideration seeks to have Washington tried along with Darryl Green and Hart, it is denied for the reasons described above.[25/]

IV. DEATH-QUALIFIED JURY

One issue remains that has been raised by the non-capital defendants, Hart and Washington, and by the Court in preliminary proceedings--namely the question of death-qualifying the jury that hears the guilt phase.

The government is plainly entitled to a death-qualified jury to try the question of punishment--whether to impose the death penalty. *Witherspoon*, 391 U.S. at 520, 88 S.Ct. 1770. And since 18 U.S.C. § 3593 as a general rule requires a guilt trial, followed by a penalty trial before the same jury, that has usually meant death-qualifying the guilt jury as well.

But the capital defendants argue that there may be no punishment phase here at all. They have a substantial

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[25/] I appreciate the government's concern in its motion for reconsideration that victims may have to testify in two trials and should I impanel a separate punishment jury, even four. But the problem must be laid at the government's doorstep, not the Court's. The government has chosen to bring this case in federal court, to bring it as a RICO charge, and to seek the death penalty. In short, it has *invited* the complexity with which the Court is dealing.

defense--whether the Esmond Street Posse is a gang at all, and surely whether whatever it is meets the requirements of RICO. While many defendants may make similar claims, these defendants have support for their position in Judge Wolf's findings in *Modlin*. Moreover, even if Esmond Street were found to be a gang and a racketeering enterprise, the defendants' submissions suggest that there will be defenses to the claim that the murders at issue were in furtherance of that enterprise, or motivated by some other concern.[26]

Death-qualification of the punishment jury would add substantially to the time it takes for both joint trials, Darryl Green/Hart on the one hand, and Morris/Washington on the other. The government concedes this fact, although it presents an estimate of two to three weeks that I feel substantially underestimates the time it would take in a case with multiple defendants and counsel. I must pause before devoting such substantial resources prior to the guilt phase when a "not guilty" verdict as to the murder count would render death-qualification unnecessary.

Moreover, death-qualification of the guilt jury raises other important issues. Studies suggest that death-qualification leads to the exclusion of a disproportionate number of black and female jurors. In recent submissions, defendant Morris has presented data to suggest that this phenomenon is particularly apparent in Massachusetts [docket # 186]. Defendant's data preliminarily suggests that African-Americans are under-represented in the jury venire[27] in the Eastern Division of Massachusetts, by as much as half their representation in the community--particularly that 7.8%-9.1% of residents in the Eastern Division of Massachusetts are in whole or in part African-American, that a significantly smaller percentage are included in the jury venire, that in the United States population 48% of black people (but only 22% of

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[26] *See* FN. 6, *supra*.

[27] Defendants do not yet have data on the Master Jury Wheel.

whites) oppose the death penalty, and that 45% of Massachusetts voters overall oppose the death penalty. Death-qualifying a jury could significantly deplete the already paltry number of minority jurors in the Eastern District.

This result was clear in *United States v. Gilbert* (98-cr-30044-MAP), where of the 600 people who completed questionnaires, the court conducted voir dire of 203 jurors to qualify sixty-four. Only eight black individuals were voir dired--six opposing the death penalty (75%) and two favoring the death penalty only in special circumstances (25%). *No black jurors were seated.* The result was the same in *United States v. Sampson,* (01-cr-10384-MLW) [19] where of the 498 jurors that completed questionnaires only twenty-three identified themselves as black (4.6%). Of the potential black jurors, ten (43.5%) were opposed to the death penalty, one (4.3%) was in favor of the death penalty, and ten were neutral (43.5%). *No black jurors were seated on the jury.*[20]

Moreover, similar studies raise the issue of whether death-qualified juries are more conviction prone. *See, e.g.,* Jill M. Cochran, Courting Death: 30 Years Since Furman, Is the Death Penalty Any Less Discriminatory? Looking at the Problem of Jury

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[19] The defense team in *Sampson* also compiled data on gender and attitudes towards the death penalty. Forty-three percent of the women, as opposed to 31.4% of the men were opposed to the death penalty. These numbers indicate a more pronounced differential than nationwide statistics indicating that 30% of women and 22% of men oppose the death penalty.

[20] These numbers present a stark comparison with the attitudes of potential white jurors who completed questionnaires. In *Gilbert,* 170 jurors identified themselves as white, Caucasian, or of European origin-- fifty-eight (34.1%) were opposed to the death penalty, fifty-six (32.9%) were generally in favor of the death penalty, and twenty-three (13.5%) approved of the death penalty in certain circumstances. In *Sampson,* 451 (90.1%) identified themselves as white--181 (40.1%) were in favor of the death penalty, 100 (22.2%) were neutral, and 170 (37.7%) were opposed. While I recognize the limitations of these statistics--the small sampling size, the limited amount of data available on the reasons for dismissal, the opinion characterizations created by defense counsel--these numbers give me great pause.

Discretion in Capital Sentencing, 38 Val. U.L.Rev. 1399 (2004)(citing Herbert H. Haines, Against Capital Punishment: The Anti-Death Penalty Movement in American, 1972-1994 (Oxford Univ. Press 1996); Roger Hood, The Death Penalty A World-Wide Perspective (Oxford Univ. Press, 2d ed.1996); William J. Bowers, The Capital Juror Project: Rationale, Design, and Preview of Early Findings, 70 IND. L.J. 1043, 1053 (1995)); Mark Cammack, In Search of the Post-Positivist Jury, 70 IND. L.J. 405 (Spring 1995). In a state without a death penalty, where forty-five percent of voters are reportedly opposed to it, the phenomenon may be even starker.

To be sure, the Supreme Court has spoken on the issue of death-qualification in the guilt phase in *Lockhart v. McCree*, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986), finding that trial before a death-qualified jury did not violate defendant's rights.[20] *See also Buchanan v. Kentucky* 483 U.S. 402, 107 S.Ct. 2906, 97 L.Ed.2d 336 (1987)(finding use of death-qualified jury for joint trial in which the death penalty was sought only against one defendant did not violate Sixth Amendment right to impartial jury). Death-qualification of the guilt jury in short, on the record then presented to the Court, did not raise constitutional issues.

But I have a different issue before me than those raised in *Buchanan*. The question here is one of severance under Rule 14, which is not an issue of constitutional entitlement but of discretion,

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[20] In *Lockhart*, the defendant offered studies suggesting that juries from which jurors who were opposed to the death penalty were excluded were more "conviction prone" than other juries, studies whose validity the Court questioned but adopted for the purposes of the decision. *See* Judge Nancy Gertner & Judith Mizner, The Law of Juries, Ch. III, part 2(A)(3) (Glasser LegalWorks 1997). The Court held that a jury so selected violated neither the fair cross-section nor the impartiality requirement. The Court held that even if the fair cross-section requirement was applied to a petit jury, as opposed to the jury venire, the group of people sharing a fixed opposition to the death penalty was not a cognizable group within the meaning of the Fourteenth Amendment. Finally, the Court also focused on the jury actually impaneled in *Lockhart* and found there was nothing to suggest that a particular juror was partial. *Id.*

not an issue of rights, but of avoiding prejudice and promoting judicial economy. Here concerns about the fairness of a joint trial because of death-qualification of the guilt jury, merge with other prudential concerns embodied in Rule 14.

The fact that death-qualification of the guilt jury will substantially increase the length of trial, and may not even be necessary at all, coupled with concerns about fairness, suggests that the Court should at least consider other methods of preserving the government's clear right to a death-qualified punishment jury.

Two methods come to mind: *Method One* involves impaneling a jury to hear the guilt phase in the usual way, without death-qualification, then picking the maximum number of alternates by law (already justified by the length of the trials even with two defendants). Should there be a conviction on Count Sixteen, the Court would then death-qualify the jurors from the first trial, including the alternates, to determine who is qualified to participate in the second trial. If there are not enough jurors to so qualify either Darryl Green in the first trial or Morris in the second, the Court would then discharge the guilt jury and impanel a new jury to hear punishment issues.

Method Two involves an order at the outset that for various case management reasons, the Court will impanel a different punishment jury if there is a conviction.

The government argues that the latter option is not available for a number of reasons. The first is statutory: The statute, 18 U.S.C. § 3593, provides that the capital hearing "shall be conducted--(1) before the jury that determined the defendant's guilt," or "before a jury impaneled for the purpose of the hearing if the jury that determined defendant's guilt was discharged for good cause." 18 U.S.C. § 3593(b). As such, the government states that there is no authority for the proposition that the court can decide in advance to discharge the guilt jury before the sentencing hearing

for "good cause," 18 U.S.C. § 3593(b)(2)(C).[11/]

I will address this question more fully after additional briefing by the parties, but a few general observations are in order. First, Method One does not involve any determination in advance. If death-qualified jurors can be found among the jurors from the guilt phase, the terms of the statute will be followed. If none can be found, the jurors will be discharged for "good cause" shown, and the statute will still be followed. To the extent there are issues about merging jurors who have deliberated at the guilt stage, with those who have not, those concerns have been addressed in Rule 24(c)(3).[12/]

Second, whatever rights accrue to the defendant under § 3593 or Rule 24(c) can be waived. If the right to appeal from a sentence can be waived, surely § 3593 rights can waived. *See, e.g., United States v. Teeter*, 257 F.3d 14 (1st Cir.2001) (presentence waivers of appeal right are presumptively valid if knowing and voluntary.) In effect, by objecting to

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[11/] The government cites *United States v. O'Driscoll*, 250 F.Supp.2d 429 (M.D Pa.2001), for the proposition that "good cause" cannot be determined at the beginning of the case, prior to the first jury returning a verdict on guilt. *O'Driscoll*, however, is not binding on this Court, addresses a different factual scenario, and provides no discussion to support its determination.

[12/] Rule 24(c)(3), Fed Crim. Pro provides:

> **Retaining Alternate Jurors.** The court may retain alternate jurors after the jury retires to deliberate. The court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to being its deliberations anew.

Rule 24(c) was amended in 1999 specifically to allow the possibility of alternate jurors replacing discharged jurors after deliberations have begun. Prior to the amendment, Rule 24(c) explicitly required the court to discharge all remaining alternate jurors when the jury retired to deliberate.

death-qualifying the guilt jury, defendants are waiving the provisions of § 3593 that arguably oblige the Court to hold guilt and punishment trials before the same jury.

The government, however, will not agree to waive the provisions of § 3593, nor obviously its rights to a death-qualified jury. The combination, it suggests, mandates death-qualifying a single jury charged with hearing guilt first, then punishment.

The government's position is disingenuous. It has no "right" to a death-qualified jury to hear the question of *guilt:* it has only a right to a death-qualified *punishment* jury. If judicial economy and expedition, defendants' waiver, and fairness point in the direction of deferring death-qualification until after the guilt phase, the government arguably has no standing to challenge it.[22]

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[22] Indeed, to suggest that § 3593 is a right that the defendant cannot waive is to place this provision on its head. 18 U.S.C. § 3593 was obviously added to the Federal Death Penalty Act of 1994, 18 U.S.C. § 3591 et seq., to address the Supreme Court's concerns in *Gregg v. Georgia*, that in a unitary proceeding, deciding both guilt and punishment, the government would be obliged to introduce highly prejudicial evidence (like criminal record) that is not otherwise admissible and that limiting instructions would be inadequate to cure the prejudice to the defendant. The Court noted: "When a human life is at stake and when the jury must have information prejudicial to the question of guilt but relevant to the question of penalty in order to impose a rational sentence, a bifurcated system is more likely to ensure elimination of the constitutional deficiencies identified in *Furman v. Georgia*[, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)]." *Gregg v. Georgia*, 428 U.S. 153, 190, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). Further, "the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprized of the information relevant to the imposition of sentence and provided with standards to guide its use of information." *Id.* at 195, 96 S.Ct. 2909. While I recognize that the government has an interest in using one jury for efficiency reasons, *Lockhart*, 476 U.S. at 180-81, 106 S.Ct. 1758, all of the parties in this case have an interest in efficiency that the Court has considered above. The government's interest in avoiding residual doubt arguments at the punishment phase in front of a new jury would also be cured by defendant's waiver.

Third, *Lockhart* and *Buchanan* only addressed the exclusion of a given viewpoint--feelings about the death penalty, not explicitly the exclusion of a disproportionate number of African Americans and women. While the exclusion of a viewpoint is not constitutionally significant, the exclusion of women and African Americans may well be. Both are plainly cognizable groups under the Fourteenth Amendment. If the net effect of death-qualification--in this Commonwealth, at this point in history--substantially undermines the participation of women and African Americans in the petit jury (and in the case of African-Americans, entirely eliminated them from the petit jury), constitutional concerns may well be raised.

Finally, it is worth noting that Governor Mitt Romney's Council on Capital Punishment, which issued its final report in May, included among its ten recommendations that "[a]t the end of the guilt-innocence stage of the capital trial, if the defendant is convicted of capital murder, the defendant should have the right to request the selection of a new jury for the sentencing stage." Governor's Council on Capital Punishment Final Report, May 3, 2004, available as of July 6, 2004 at http://www.mass.gov/Agov2/docs/5-3- 04MassDPReportFinal.pdf. *See also,* Governor Mitt Romney's Office Press Release: Romney Accepts Findings of Capital Punishment Council, May 3, 2004, available as of July 6, 2004, at http://www.mass.gov/portal/govPR.jsp?gov_pr=gov_pr_040503_death_penalty.xml.

The Council recommended giving a defendant this right to avoid the "insurmountable strategic dilemma" of having to choose between exercising his constitutional right to contest the prosecution's case at the guilt-innocence stage, and credibly expressing remorse at the penalty phase. As the Council noted, having a separate jury for the penalty phase is not unusual--it occurs whenever a death sentence--but not the underlying conviction--is set aside on appeal or by a habeas corpus court, and

the prosecution seeks to retry the penalty phase to a new jury. [24]

Nevertheless, I defer the question of death-qualification for additional briefing. Additional briefs are to be filed by August 15, 2004, on this issue.

V. CONCLUSION

The following lineup promotes fairness and judicial efficiency, enhances the Court's ability to manage these complex trials and accomplishes the following a) severance of Morris from Darryl Green, in both the guilt and punishment phases, b) minimizing prejudice to the non-capital defendants: Darryl Green and Hart tried together (on January 10, 2005), followed by Brandon Morris and Edward Washington (on April 11, 2005) in a single trial or not, depending on the resolution of the government's motion to reconsider, and then Torrance Green (on July 11, 2005).

The Court has set aside blocks of time for the hearing of pretrial motions over the next six months. To the extent that pretrial motions raise joint issues (challenges to the composition of the jury venire, issues concerning death-qualification), the Court will consider them at the same time, in joint proceedings. *See* June 2, 2004, Procedural Order [docket # 162]. To the extent that pretrial motions raise issues unique to each trial (motions in limine concerning evidentiary issues), the Court will consider them separately.

The Court reserves the following issues until a later date:

1. The review of the government's motion to reconsider the Morris-Washington pairing.

2. A final ruling on the issue of death-qualification until

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[24] Moreover, some of the government's concerns about repetitive presentations about resources could be addressed in the old fashioned way -- i.e. stipulated summaries of trial evidence.

the parties have had an opportunity to brief the issue further. Briefs on this issue are to be filed no later than August 15, 2004.

3. Consideration of the severance of Count Eleven from any Morris trial on the remaining counts.

4. Consideration of the ways in which evidence may be specifically limited in the severed trials.

SO ORDERED.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)
	) CRIMINAL. NO. 02-10301-NG
v.	)
DARRYL GREEN, JONATHAN HART, EDWARD WASHINGTON, BRANDEN MORRIS, and TORRANCE GREEN, Defendants.	)

GERTNER, D.J.:

AMENDED
MEMORANDUM AND ORDER RE: BIFURCATION
November 4, 2004

The Memorandum and Order Re: Bifurcation, originally issued November 3, 2004, has been amended due to a typographical error on page 1. The citation United States v. Green has been changed from "324 F.Supp.2d 211" to "324 F.Supp.2d 311." This amended version hereby supplants the original version.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)	
	)	CRIMINAL. NO. 02-10301-NG
v.	)	
	)	
DARRYL GREEN,	)	
JONATHAN HART,	)	
EDWARD WASHINGTON,	)	
BRANDEN MORRIS, and	)	
TORRANCE GREEN,	)	
Defendants.	)	

GERTNER, D.J.:

AMENDED
MEMORANDUM AND ORDER RE: BIFURCATION
November 4, 2004

On July 7, 2004, I issued a Memorandum and Order Re: Severance/Bifurcation of Guilt and Punishment. *See United States v. Green*, 324 F.Supp.2d 311 (D.Mass.2004). I noted that it was an open question as to whether the Court, sitting on a federal death penalty-eligible case (under 18 U.S.C. §§ 3591-3593), was obliged to impanel a single jury charged with determining both guilt and, if necessary, punishment, and death-qualify that group before either proceeding began. I proposed two methods to address the question, and called for additional briefing:

> *Method One* involves impaneling a jury to hear the guilt phase in the usual way, without death-qualification, then picking the maximum number of alternates by law (already justified by the length of the trials even with two defendants). Should there be a conviction on Count

> Sixteen, the Court would then death-qualify the jurors from the first trial, including the alternates, to determine who is qualified to participate in the second trial. If there are not enough jurors to so qualify either Darryl Green in the first trial or Morris in the second, the Court would then discharge the guilt jury and impanel a new jury to hear punishment issues.
>
> *Method Two* involves an order at the outset that for various case management reasons, the Court will impanel a different punishment jury if there is a conviction.

Green, 324 F.Supp.2d at 331.

Both sides have now fully briefed the issue. As described below, the defendants have rejected Method One and have argued for adopting Method Two. The government opposes both methods.

After reviewing the materials and relevant case law, I conclude the following: I will impanel two different juries, if necessary, for each death-eligible defendant, one jury to determine guilt or innocence and the other to reject or to impose the death penalty. I will death-qualify the punishment jury only, should a penalty proceeding become necessary. As described more fully below, my reasons are as follows:

1.18 U.S.C. § 3593 does not require two hearings before a single jury (described as a "unitary jury system"). This provision simply codified death-eligible defendants' constitutional right to a bifurcated hearing (on guilt/innocence and punishment), whether before a single jury (following a guilty verdict) or before a second jury. In any event, to the extent that § 3593 can be read to require a unitary jury, defendants waive that requirement.

2. I will accept the defendants' waiver of a unitary jury for both prudential reasons, as well as for reasons of fairness. As I noted in my memorandum on severance, *see Green*, 324 F.Supp.2d at 329, and as I describe more fully below, death-qualification, particularly in this Commonwealth at this time, will needlessly

extend an already complicated jury selection process. And the effort will be completely unnecessary if the defendants are not convicted of the death-eligible offense.

3. While the Supreme Court has held that death-qualifying a unitary jury is not unconstitutional, neither has it held that the Constitution *requires* it. Put simply; just because death-qualifying the liability jury that may also hear the penalty phase does not offend a *defendant's* rights, does not mean its opposite: That the failure to death-qualify the liability jury (while death-qualifying the punishment jury) somehow undermines the *government's* rights.

4. Indeed, the government has no entitlement to a death-qualified *guilt/innocence* jury, or for that matter, to a unitary jury hearing both phases. It only has a right to death-qualify the jury that will determine *punishment*. *See Witherspoon v. Illinois*, 391 U.S. 510, 520, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

5. The government's important concerns about the impartiality of the liability jury can be adequately addressed through voir dire, which, while not nearly as extensive as a voir dire that includes "death-qualification," will nevertheless be probing and exhaustive.

6. The government's important concerns about witnesses testifying in multiple proceedings can likewise be addressed by the Court. First, it is premature to assume that there will be a punishment phase, and thus, multiple proceedings for each defendant. Second, if there is a punishment phase, there are evidentiary techniques to relieve witnesses from having to appear a second time, techniques like videoconferencing, use of transcripts, stipulations, etc.

In choosing the two juries approach, I do not have to reach the constitutional question raised by defendants whether recent studies establish that death-qualifying the liability jury skews the decision-making process of the jury by making it more conviction prone and less representative. I make my decision based upon the

defendants' waiver of rights under § 3593, concerns about trial length and complexity, and the unique problems of selecting a death-qualified jury in Massachusetts given its demographics and attitudes.

I. BACKGROUND

Count Sixteen of the superceding indictment in the above entitled case alleges that Branden Morris ("Morris") and Darryl Green[1/] killed Terrell Gethers ("Gethers") "for the purpose of maintaining and increasing position in the Enterprise, which was an Enterprise engaged in racketeering activity." *See* Superseding Indictment, filed September 17, 2003, p. 32. The government alleges that the "Racketeering Enterprise" element was met by the activities of the "Esmond Street Posse" (hereinafter "Esmond Street"). Esmond Street, it claims, was an enterprise whose goal was to engage in the sale of crack cocaine and marijuana, to seek to prevent others from interfering with their sales, and specifically, to carry on a violent dispute with a rival gang, the Franklin Hill Giants. That dispute allegedly led to a number of murders and attempted murders during a one year period in 2000 and 2001.[2/]

There were multiple motions for severance from nearly every party, which I resolved. My goal in responding to the motions--like my goal in the instant motion--was to balance the substantial concerns of both sides. Accordingly, I made the

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[1/] I will use the full names of Darryl Green and his codefendant Torrance Green in this memorandum, to distinguish them.

[2/] As I noted in my July 7, 2004, memorandum, defendants argue "that the government has no reasonable expectation that the several acts alleged in the indictment comprise acts in furtherance of an Esmond Street racketeering enterprise, because of Judge Wolf's findings in *United States v. Modlin*, 01-cr-10314-MLW. In *Modlin*, a drug distribution indictment in which three of the defendants here were named (along with others), the Court at sentencing rejected the allegation that anything like an Esmond Street conspiracy existed. Esmond Street, the Court concluded, involved nothing more than a group of people who hung out together in the same geographical area, and dealt drugs independently of one another." *Green*, 324 F.Supp.2d at 314-315.

following orders: Darryl Green and Jonathan Hart will be tried on January 10, 2005; Branden Morris and Edward Washington will be tried on April 11, 2005 (although I indicated that I would revisit their joinder following the completion of the Darryl Green/Hart trial). Torrance Green will be tried alone on July 11, 2005. In addition, I scheduled trial dates and set aside monthly hearings to expedite the proceedings. To date, the cases are progressing according to the schedule.

The issue before me principally concerns the conduct of the trials of the two death penalty defendants, Morris and Darryl Green. However, since the trial of each is joined with another defendant not facing the death penalty (Washington and Hart respectively), these issues in fact affect virtually all the defendants.

Should a penalty phase be necessary, there is no question that the government is entitled to death-qualify the *punishment* jury. *Witherspoon*, 391 U.S. at 520, 88 S.Ct. 1770. Specifically, the government may ask whether the veniremen's views about the death penalty "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985) (internal quotations omitted); *Witherspoon*, 391 U.S. at 520, 88 S.Ct. 1770.

Since the usual practice is to have a guilt trial followed by a penalty trial before the same jury, the usual result is that the Court death-qualifies the guilt jury as well.[2] Section 3593, for example, codifies this practice by providing that the capital hearing "shall be conducted--(1) before the jury that determined the defendant's guilt," or "before a jury impaneled for the purpose of the hearing if the jury that determined defendant's guilt was

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[2] Method One, which involved proceeding with the liability jury without death-qualification, and then picking the penalty phase jury from the existing jury, should there be a conviction on Count 16 does not even arguably run afoul of § 3593. If there are not enough death-qualified jurors to proceed to the penalty phase, the Court can find "good cause" and dismiss the existing jury and impanel a new one. But all parties reject this alternative.

discharged for good cause." 18 U.S.C. § 3593(b).

But the usual practice of death-qualifying a single jury charged with hearing both liability and punishment is neither constitutionally nor statutorily required. It has simply evolved as a standard practice. Nothing prevents this Court from fashioning a different procedure more suited to the facts of this case, to the exigencies of the Court's calendar, and to the promotion of fairness to both sides.

Defendants' claims raise the following questions:

1) Does 18 U.S.C. § 3593 require that the guilt/innocence jury and the punishment jury be one and the same?
2) If the punishment jury must be "death-qualified," does it follow that the guilt/innocence jury also must be "death-qualified"?
3) Can the defendant waive rights under § 3593 over the government's objection?
4) If these rights can be waived, how can the government's interests be protected?

II. LEGAL FRAMEWORK

A. 18 U.S.C. § 3593 Only Requires a Bifurcated Proceeding; It Does Not Mandate a Unitary Jury

1. Gregg v. Georgia

In *Gregg v. Georgia*, 428 U.S. 153, 190-91, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), the Supreme Court held that the Constitution requires a bifurcated proceeding in a death penalty case, one to determine guilt and the other to determine punishment. A single proceeding to resolve both issues, the Court found, had serious constitutional flaws. For example, the government would be obliged to introduce highly prejudicial evidence (like criminal record) that is not otherwise admissible. Limiting instructions would be inadequate to cure the prejudice suffered by the

defendant. As the Court noted: "When a human life is at stake and when the jury must have information prejudicial to the question of guilt but relevant to the question of penalty in order to impose a rational sentence, a bifurcated system is more likely to ensure elimination of the constitutional deficiencies identified in *Furman v. Georgia* [408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)]." *Id.* at 191-92, 96 S.Ct. 2909.

Gregg, however, did not address the issue of whether that bifurcated proceeding had to be held before a single jury or two juries. The Georgia statute which the Court reviewed involved a unitary jury, with a penalty phase immediately following a liability phase.[4] The issue before this Court was not raised.

2. Death Qualification

Long before *Gregg* and the bifurcated jury requirement, it was a "nearly universal" practice for a state to permit the broad exclusion of veniremen with conscientious scruples against capital punishment.[5] In *Witherspoon* the Court scrutinized this practice, narrowing what "death qualification" meant. The Court vacated the sentence of a defendant from whose jury the state had excluded all venire persons expressing any scruples against capital punishment. Such a practice, the Court held, created a "tribunal

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[4] Indeed, the statute, Georgia Laws, 1973, Act No. 74, p. 162, contemplated proceedings before a judge or a jury: "At the conclusion of all felony cases heard by a jury, and after argument of counsel and proper charge from the court, the jury shall retire to consider a verdict of guilty or not guilty without any consideration of punishment. In non-jury felony cases, the judge shall likewise first consider a finding of guilty or not guilty without any consideration of punishment. Where the jury or judge returns a verdict or finding of guilty, the court shall resume the trial and conduct a pre-sentence hearing before the jury or judge at which time the only issue shall be the determination of punishment to be imposed..." *See Gregg*, 428 U.S. at 208, n. 2, 96 S.Ct 2909.

[5] Michael W Peters, "Constitutional Law: Does 'Death Qualification Spell Death for the Capital Defendant's Constitutional Right to an Impartial Jury?" [*Lockhart v. McCree*, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986)] 26 Washburn L.J. 382, 382 n. 16 (1987).

organized to return a verdict of death." *Witherspoon*, 391 U.S. at 541, 88 S.Ct. 1770. The only jurors who could be excluded were those who "made unmistakably clear ... that they would automatically vote against the imposition of capital punishment," or that they could not assess the defendant's guilt impartially. *Id.* at 522-523 n. 21, 88 S.Ct. 1770.

But again, *Witherspoon* and its progeny, *Wainwright*, did not address the question before me--whether the Court is obliged to death-qualify a unitary jury. While the Court raised concerns about the practice, and suggested two juries, it did not resolve the issue.

3. Unitary Jury Versus Two Juries

In *Lockhart v. McCree*, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986), the Court finally addressed, albeit indirectly, the question of whether the Constitution permits or prohibits a unitary jury or dual juries. In *Lockhart* the court concluded that the practice of death-qualifying the unitary jury did not violate a defendant's rights.[6] *See also Buchanan v. Kentucky*, 483 U.S. 402, 107 S.Ct. 2906, 97 L.Ed.2d 336 (1987) (finding that the use of death-qualified jury for a joint trial in which the death penalty was sought only against one defendant did not violate the Sixth Amendment right to an impartial jury). Death-qualification of the

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[6] In *Lockhart*, the defendant offered studies suggesting that juries from which jurors who were opposed to the death penalty were excluded were more "conviction prone" than other juries, studies whose validity the Court questioned but adopted for the purposes of the decision. *See* Judge Nancy Gertner & Judith Mizner, *The Law of Juries*, Ch. III, part 2(A)(3) (Glasser LegalWorks 1997). The Court held that even assuming *arguendo* that a death-qualified jury was conviction-prone, it did not violate the fair cross-section requirement because the petit jury was involved and not the jury venire. Moreover, even if the fair cross-section requirement were applied to a petit jury, a group of people sharing a fixed opposition to the death penalty was not a cognizable group within the meaning of the Fourteenth Amendment. Finally, the Court also focused on the jury actually impaneled in *Lockhart* and found there was nothing to suggest that any particular juror was partial. *Id.*

unitary jury, in short, on the record then presented to the Court,[7] did not raise constitutional issues.

But that conclusion did not suggest its opposite, which the government argues here--that a court *must* have a unitary jury, that the unitary jury *must be* death-qualified in all cases, and indeed, that the government has a right to a death-qualified unitary jury. The precise question in *Lockhart* was whether "the Constitution prohibit[s] the removal for cause, prior to the guilt phase of a bifurcated capital trial, of prospective jurors whose opposition to the death penalty is so strong that it would prevent or substantially impair the performance of their duties as jurors at the sentencing phase of the trial." *Id.* at 165, 106 S.Ct. 1758. The Court held that the Constitution did not *prohibit* the removal of death penalty opponents for cause. Importantly, it did not hold that the Constitution *requires* the removal of death penalty opponents prior to the guilt phase.

Indeed, dicta in *Witherspoon* supports the view that a unitary jury is not mandated. In *Witherspoon*, the Court addressed the state's interest "in submitting the penalty issue to a jury capable of imposing capital punishment" on the one hand, and the defendant's "interest in a completely fair determination of guilt or innocence," on the other. The Court suggested that one way to accommodate these concerns was to use one jury to decide guilt and another to fix punishment. *Witherspoon*, 391 U.S. at 520 n. 18, 88 S.Ct. 1770.[8] While the *Lockhart* court ultimately concluded

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[7] The Court found the record "fragmentary" and "tentative." *Lockhart*, 476 U.S. at 170, 106 S Ct Defendants have offered more recent studies which they seek to use to confirm the defendant's position in *Lockhart* and address the Court's concerns *See infra* Section II(B).

[8] The Court said:

> [A] defendant convicted by ... a [unitary] jury in some further case might still attempt to establish that the jury was less than neutral with respect to guilt. If he were to succeed in that effort, the question would then arise whether the State's interest in submitting the penalty issue to

that that accommodation was not mandated by the Constitution, [9] nothing in the decision suggests that a court could not implement it in an appropriate case. In any case, the fact that the Court did not find a violation of defendant's constitutional rights, and thus, that there was no need to accommodate those rights with the state's concerns, did not somehow "constitutionalize" the state's interest in the quickest and most efficient capital trial.

4. § 3593 Does Not Require a Unitary Trial; to the Extent it Can Be So Interpreted, the Requirement Can Be Waived

The relevant statute, 18 U.S.C. § 3593, seems to reflect the long-standing practice of a unitary jury. It provides that the capital sentencing hearing "shall be conducted (1) before the jury that determined the defendant's guilt," or (2) "before a jury impaneled for the purpose of the hearing if ... the jury that determined defendant's guilt was discharged for good cause." 18 U.S.C. § 3593(b).

The government argues that there is no authority for the proposition that the court can decide in advance to discharge the guilt jury before the sentencing hearing for "good cause." *See* 18 U.S.C. § 3593(b)(2)(C).[10] Defendants argue that "evidence of

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> a jury capable of imposing capital punishment may be vindicated at the expense of the defendant's interest in a completely fair determination of guilt or innocence--given the possibility of accommodating both interests by means of a bifurcated trial, using one jury to decide guilt and another to fix punishment. That problem is not presented here, however, and we intimate no view as to its proper resolution.

Witherspoon, 391 U.S. at 520 n. 18, 88 S.Ct. 1770.

[9] *See Lockhart*, 476 U.S. at 184, 106 S.Ct. 1758 (Marshall, J. dissenting).

[10] The government cites *United States v. O'Driscoll*, 250 F.Supp.2d 429 (M.D.Pa.2001), for the proposition that "good cause" cannot be determined at the beginning of the case, prior to the first jury returning a verdict on guilt. However,

systematic error" in administering the death penalty, particularly where a defendant was convicted by a death-qualified jury, rises to the level of "good cause" for dismissing the liability jury and impaneling a separate sentencing jury.

In any event, whatever rights accrue to the defendant under § 3593 can be waived. In effect, by objecting to death-qualifying the guilt jury, defendants are waiving the provisions of § 3593 that arguably oblige the Court to hold guilt and punishment trials before the same jury.[11/]

If the right to appeal from a sentence can be waived along

O'Driscoll is not binding on this Court, and moreover addresses a factual scenario that does not raise the kind of prudential concerns driving this Court's decision. The judge in that case faced a trial involving one defendant and one murder charge. This Court faces five defendants, three trials, and dozens of charges. Even absent the task of death-qualifying the jury, voir dire is bound to be lengthy and complex. Thus, the court in *New Jersey v. Monturi*, 195 N.J.Super. 317, 478 A.2d 1266 (1984) supported an approach identical to this Court's: ("[T]he concepts of due process, fundamental fairness and judicial economy permit the court to declare before the guilt phase... that a non 'death-qualified' jury will be impaneled to hear the guilt phase and a separate 'death-qualified' jury will be impaneled to hear the penalty phase if required," *id.* at 325, 478 A.2d 1266).

[11/] In *Lockhart v. McCree*, 476 U.S. 162, 106 S.Ct 1758, 90 L.Ed.2d 137 (1986), discussed *infra*, the Supreme Court conjectured that a defendant may benefit from being able to appeal at sentencing to the "residual doubts" of the same jurors who found him guilty. *Lockhart*, at 181, 106 S.Ct. 1758. In his dissent, Justice Marshall found the majority's concern disingenuous, "unless the state is willing to grant the defendant the option to waive this paternalistic protection in exchange for better odds against conviction." *Id.* at 205, 106 S.Ct. 1758 (Marshall, J., dissenting) (internal citations omitted) It is further troubling, he wrote, to appeal to "a defendant's power to appeal to 'residual doubts' at his sentencing," *Id.* at 206, 106 S Ct. 1758, when the Court consistently refuses to reexamine lower court decisions precluding defendants from explicitly appealing to these doubts during sentencing proceedings. *See, e.g., Burr v. Florida*, 474 U.S. 879, 106 S.Ct. 201, 88 L.Ed.2d 170 (1985) (Marshall, J., dissenting from denial of certiorari).

In any event, even if there is an advantage that could accrue to the defendant with a unitary system, these defendants have chosen to waive it.

with a long list of other rights, surely § 3593 rights can be waived. *See, e.g., United States v. Teeter*, 257 F.3d 14 (1st Cir.2001) (presentence waivers of appeal right are presumptively valid if knowing and voluntary.)

a. **Government's Rights to a Fair Jury Will Not Be Violated by a Dual Jury Procedure**

In my first decision I indicated that the government did not have a right to a death-qualified jury to hear the question of guilt. The government responded that it has the "right to have a jury of fair minded citizens who are able to apply the law Congress has enacted." And it cites as an example, "a juror does not have to agree with the drug laws in order to sit on a jury for a drug case, but his or her feelings about the drug laws must not be such as to prevent them from fairly rendering a verdict based on the evidence."

But following with the drug analogy: The government has a right to question a juror about whether he agrees or disagrees with the prosecution of individuals for drug offenses. They plainly would not have the right to question a juror about whether he or she thinks 20 years is too long for someone convicted of the crime. In the ordinary case, voir dire does not and *should not* include questioning about punishment, e.g., what a juror's feelings are about convicting of "x" crime if it results in "y" sentence. Neither should the liability jury voir dire here.

Witherspoon and *Wainwright* involved a unique series of questions geared to a juror's ability to impose the death penalty--whether views about the death penalty "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright*, 469 U.S. at 424, 105 S.Ct. 844 (internal citations omitted). The liability jury will not be deciding whether to impose the death

penalty, any more than an ordinary jury would.[12]

Indeed, in the usual criminal case, courts are scrupulous about avoiding telling jurors about punishment. In *Pope v. United States*, 298 F.2d 507 (1962), for example, the Court stated, "To inform the jury that the court may impose minimum or maximum sentence ... or other matters relating to disposition of the defendant, tend to draw the attention of the jury away from their chief function as sole judges of the facts, open the door to compromise verdicts and to confuse the issue or issues to be decided." *Id.* at 508; *see also Shannon v. United States*, 512 U.S. 573, 114 S.Ct. 2419, 129 L.Ed.2d 459 (1994).[13]

Indeed, the observations of *Shannon* and *Pope* apply with special force here, given the data on the "conviction proneness" of death-qualified juries, on the one hand, and the Court's concerns about jury nullification in *Wainwright* and *Witt* on the other. If the liability and punishment functions are separated, there is no reason to risk prejudice to either side by death-qualifying a jury addressing only the former.

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[12] The *Witherspoon* quote cited by the government makes this clear: "The most that can be demanded of a venireman in this regard is that he *be willing to consider all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings.*" *Witherspoon*, at n. 21 (italics supplied).

[13] In *Pope*, the Fifth Circuit held that the trial court properly refused the defendant's requested jury instruction that if the defendant were found not guilty on the ground of insanity, the court would commit him to a state mental institution until he was cured and it was deemed safe to release him. *Pope*, 298 F.2d 507 Likewise, in *Shannon*, the Supreme Court held that the Insanity Defense Reform Act does not require a jury instruction regarding the consequences to the defendant of a verdict of not guilty by reason of insanity, except under certain limited circumstances *Shannon*, 512 U.S. 573, 114 S.Ct. 2419. Both cases emphasized the limited function of the jury to find the facts and to decide whether, on those facts, the defendant is guilty of the crime(s) charged; information regarding the consequences of the verdict is thus irrelevant to the jury's task. *Id.* at 579, 114 S.Ct. 2419.

b. **The Government's Concerns about Cost, and Impact of Multiple Proceedings on its Witnesses Can Be Accommodated Through Other Means**

The government argues that it is unfair to require its witnesses to participate in multiple proceedings. As I noted in my memorandum on severance, multiple liability proceedings are already required here because of the scope and complexity of the government's indictment--five defendants, a racketeering conspiracy spanning 15 months, antagonistic defenses, co-conspirator's statements.

It is premature to conclude that there will be a need for a punishment phase at all. The capital defendants have a substantial defense--whether the Esmond Street Posse is a gang at all, and whether whatever it is meets the requirements of RICO. While many defendants may make similar claims, these defendants have support for their position in Judge Wolf's findings in *Modlin*. *See Green*, 324 F.Supp.2d at 321 n. 16. Moreover, even if Esmond Street were found to be a gang and a racketeering enterprise, the defendants' submissions suggest that there will be defenses to the claim that the murders at issue were in furtherance of that enterprise, or motivated by some other concern.[14/]

The government concedes the fact that death-qualification of the punishment jury would add substantially to the time it takes for the Darryl Green/Hart trial and the Morris/Washington trial. Indeed, the government's view of what death-qualification requires substantially underestimates the time it will take in a case with

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[14/] Morris's counsel, by way of affidavit, suggests that three periods of violence can be discerned from the discovery so far--the first spurt of violence, from September 8 to 16, 2001, caused by "a lack of respect" (when one individual bumped into another and refused to apologize), the second in April of 2001, with no known motive, and the third on August 24, and 25, 2001, over a young woman. Affidavit of Patricia Garin, attached to Morris' Supplemental Memorandum in Support of Motion to Sever Count Eleven [docket # 165] filed June 18, 2004.

multiple defendants and counsel. In a system using separate juries for guilt and penalty phases, time and resources would be saved every time a capital case did not require a penalty phase. It is entirely appropriate for this Court to avoid devoting such substantial resources to jury selection prior to the guilt phase when a "not guilty" verdict as to the murder count would render death-qualification unnecessary.

To be sure, the government plainly has an important interest in avoiding the unnecessary repetition of the trauma, fear, and risk associated with testifying for witnesses and victims of the charged violence. But that concern can be accommodated in a variety of ways, such as stipulated summaries of evidence, transcripts and videoconferencing. *See, e.g.*, Bruce Winick, *Prosecutorial Peremptory Challenge Practices in Capital Case: An Empirical Study and a Constitutional Analysis*, 81 Mich. L.Rev. 1, 57 (1982).

B. Unique Complexity of Death-Qualifying a Massachusetts Jury

As I noted in my initial order, studies suggest that death-qualification leads to the exclusion of a disproportionate number of black and female jurors, especially in this Commonwealth. Defendant's preliminary data suggests that African-Americans are under-represented in the jury venire[12/] in the Eastern Division of Massachusetts, by as much as half their representation in the community--particularly that 7.8%--9.1% of residents in the Eastern Division of Massachusetts are in whole or in part African-American, that a significantly smaller percentage are included in the jury venire, that in the United States population 48% of black people (but only 22% of whites) oppose the death penalty, and that 45% of Massachusetts voters overall oppose the death penalty. *See Green*, 324 F.Supp.2d at 329. Death-qualifying a jury could significantly deplete the already paltry number of minority jurors in the Eastern District.

[12/] Defendants do not yet have data on the Master Jury Wheel.

Initial data gathered by defendants [docket entry # 56] indicates that economic status and racial compositions of cities are closely connected to the return rates of the local census, which determines which names are placed on the Master Jury Wheel. Defendant Branden Morris' *Ex Parte* Motion for Funds For Andrew Beveridge, filed August 23, 2004, at ¶ 9. Potential jurors whose names are placed on the Master Wheel by the Federal Jury Commissioner are mailed a jury summons and a juror questionnaire. *Id.* Further preliminary research by defendants indicates that only approximately half of the summonses mailed are returned with completed questionnaires, and that, of the questionnaires returned over the last three years, the percentage returned by African-Americans was around 3%. *Id.*

These two factors – the large percentage of African-Americans who are opposed to the death penalty and the disproportionately small number of African-Americans in the Eastern District of Massachusetts jury venire – de facto exclude all or most African-Americans from a death-qualified jury.

This result was clear in *United States v. Gilbert* (98-cr-30044-MAP), where of the 600 people who completed questionnaires, the court conducted voir dire of 203 jurors to qualify sixty-four. Only eight black individuals were voir dired--six opposing the death penalty (75%) and two favoring the death penalty only in special circumstances (25%). *No black jurors were seated.* The result was the same in *United States v. Sampson,* (01-cr-10384-MLW)[16] where of the 498 jurors that completed questionnaires only twenty-three identified themselves as black (4.6%). Of the potential black jurors, ten (43.5%) were opposed to the death penalty, one (4.3%) was in favor of the death penalty, and ten were neutral (43.5%). *No black jurors were*

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[16] The defense team in *Sampson* also compiled data on gender and attitudes towards the death penalty. Forty-three percent of the women, as opposed to 31.4% of the men were opposed to the death penalty. These numbers indicate a more pronounced differential than nationwide statistics indicating that 30% of women and 22% of men oppose the death penalty.

seated on that jury either.[17]

Moreover, similar studies raise the serious concern that death-qualified juries are more conviction prone. In both of the cases where it considered the issue--*Witherspoon* and *Lockhart*--the Supreme Court has rejected this argument citing "tentative and fragmentary" data. *Lockhart* at 170, 106 S.Ct. 1758 (citing *Witherspoon* at 517-18, 88 S.Ct. 1770). Notably, the Court did not wholly foreclose any constitutional infirmities stemming from conviction-prone death-qualified juries. *See Witherspoon* at 517-518, 88 S.Ct. 1770 ("We simply cannot conclude... *on the basis of the record now before us... In light of the presently available information...* " that excluding jurors opposed to capital punishment increases the risk of conviction to the level of constitutional infirmity) (emphasis added). In the years since *Witherspoon* and *Lockhart* were decided, significant social science research has been devoted to studying the effect of death-qualification on jurors.

Updated data presented by defendants in this case overwhelmingly shows that death-qualified jurors are significantly more conviction prone than jurors who are not death qualified. For example, nearly one half (49.2%) of all death-qualified capital jurors make their sentencing decision before the penalty phase of the trial even begins. Darryl Green and Branden Morris's Supplemental Memorandum On the Issue of Impaneling Separate Juries, filed September 10, 2004, at p. 6 (citing William Bowers and Wanda Foglia, *Still Singularly Agonizing: Law's Failure to*

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[17] These numbers present a stark comparison with the attitudes of potential white jurors who completed questionnaires. In *Gilbert*, 170 jurors identified themselves as white, Caucasian, or of European origin-- fifty-eight (34.1%) were opposed to the death penalty, fifty-six (32.9%) were generally in favor of the death penalty, and twenty-three (13.5%) approved of the death penalty in certain circumstances. In *Sampson*, 451 (90.1%) identified themselves as white--181 (40.1%) were in favor of the death penalty, 100 (22.2%) were neutral, and 170 (37.7%) were opposed. While I recognize the limitations of these statistics--the small sampling size, the limited amount of data available on the reasons for dismissal, the opinion characterizations created by defense counsel--these numbers give me great pause.

Purge Arbitrariness from Capital Sentencing, 30 Crim. Law Bulletin 51, 56 (2003)). Several qualitative studies found that jurors who were exposed to the potential punishment during jury selection have a propensity to believe that the subtext of the voir dire is that the trial is not about whether the defendant committed the underlying crime but about what punishment the defendant should receive. *Id.* at 9-10 (citing Craig Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process*, 8 Law & Human Behavior 121 (1984); *Examining Death Qualification: Further Analysis of the Process Effect*, 8 Law & Human Behavior 133 (1984); Haney, Hurado & Vega, *"Modern" Death Qualification: New Data on Its Biasing Effects*, 18 Law & Human Behavior 619 (1994)). These findings represent just a sliver of the recent data indicating that death-qualified jurors are skewed to be conviction-prone.

While this decision does not rest on the conviction-prone juror problem, and its constitutional implications, it surely affects my obligations as a trial judge. Death penalty qualification hinders my responsibility to facilitate, to the best of my ability, a fair trial on guilt. It provides an additional "good cause" justifying bifurcating the juries in the trials of the capital defendants before me.

III. CONCLUSION

For all the above reasons, I will impanel a jury to decide guilt/innocence and, if necessary, a separate jury to decide penalty. I will "death-qualify" only the latter jury.

SO ORDERED.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)
	) CRIMINAL. NO. 02-10301-NG
v.	)
DARRYL GREEN, JONATHAN HART, EDWARD WASHINGTON, BRANDEN MORRIS, and TORRANCE GREEN, Defendants.	)

GERTNER, D.J.:

ADDITIONAL FINDINGS RE: BIFURCATION
December 29, 2004

On November 4, 2004, the Court issued an Amended Memorandum and Order Re: Bifurcation. In that memorandum, I made the following order regarding the trials of Branden Morris and Darryl Green:

> I will impanel a jury to decide guilt/innocence and, if necessary, a separate jury to decide penalty. I will 'death-qualify' only the latter jury.

United States v. Green, 343 F.Supp.2d 23 (D.Mass.2004).

I based my decision on a number of grounds, which I discussed at some length in the memorandum. I reiterate those findings with additional observations on the impact that my order would have on the government's witnesses and the costs of the

proceeding. As I noted:

First, multiple liability proceedings are already required here because of the scope and complexity of the government's indictment--five defendants, a racketeering conspiracy spanning 15 months, antagonistic defenses, co-conspirator's statements.

Second, I noted that it was premature to conclude that there will be a need for a punishment phase at all.

> The capital defendants have a substantial defense--whether the Esmond Street Posse is a gang at all, and whether whatever it is meets the requirements of RICO. While many defendants may make similar claims, these defendants have support for their position in Judge Wolf's findings in *Modlin*. *See Green*, 324 F.Supp.2d at 321 n. 16. Moreover, even if Esmond Street were found to be a gang and a racketeering enterprise, the defendants' submissions suggest that there will be defenses to the claim that the murders at issue were in furtherance of that enterprise, or motivated by some other concern.

Green, 343 F.Supp.2d at 32.

Third, I found that death-qualification of the punishment jury would add substantially to the time it takes for the Darryl Green/Hart trial and the Morris/Washington trial, as the government conceded. I indicated that "[i]n a system using separate juries for guilt and penalty phases, time and resources would be saved every time a capital case did not require a penalty phase. It is entirely appropriate for this Court to avoid devoting such substantial resources to jury selection prior to the guilt phase when a 'not guilty' verdict as to the murder count would render death-qualification unnecessary." *Id.* at 33.

Finally, I noted the government's important interest in avoiding the unnecessary repetition of the trauma, fear, and risk

associated with testifying for witnesses and victims of the charged violence, and suggested ways of accommodating those interests. *Id.*

I wish to elaborate on the latter findings. This is not a case, as in *United States v. Sampson,* Crim. No. 01-10384-MLW (D.Mass.), where the details of the murder will provide most, if not all, of the grounds for the government's decision to seek the death penalty in the penalty phase. In *Sampson,* for example, the defendant's penalty proceeding focused on the cruelty with which he committed each of the three murders to which he had pled guilty. Had there been a liability phase--had Sampson not pled--the evidence in both phases would have been very similar.

In contrast, from the government's preliminary submissions it appears that in this case the liability and penalty phases will not necessarily be focused on the same set of facts or witnesses. The government will not recreate the details of the murder of Terrell Gethers, the capital murder at issue in the liability proceedings, in seeking to make its case that Green and Morris are deserving of the death penalty.

The liability phase will address the merits of the allegations--the existence and nature of the enterprise, racketeering acts of the defendants in furtherance of that enterprise, and finally, what happened on the day of Gethers's murder, and its relation to the enterprise.[1/]

[1/] In the Government's Response to Defendants' Motion to Sever at 1-4 [document # 141] and the Superceding Indictment [document # 92], the government suggests that liability will be about the following. that an enterprise--the Esmond Street gang--existed, and the enterprise engaged in racketeering, drug dealing, conspiracy to murder, murder, assault, and the use of a firearm during a crime of violence. More specifically, the government will try to show that Esmond Street engaged in an ongoing violent dispute with a rival gang, the Franklin Hill Giants; Green shot Anthony Vaughan in the back of the head on or around July 3, 2001;. Green and Morris shot and killed Terrell Gethers, and during the ongoing gang dispute, a firearm used in furtherance of the conspiracy was seized from Morris on April 16, 2001.

But the specific details of the murder--how it was done, with what degree of cruelty--are not likely to be the focus of the penalty phase. In the government's Notice of Intent to Seek the Death Penalty [document # 94], it lists the following as the bases for the recommendation of death: a) whether Morris and Green intentionally killed Gethers, and b) whether, by shooting into a crowded area, they created a risk of death to additional people; c) the assault with intent to murder Anthony Vaughan, which is both a racketeering act allegation in the Superceding Indictment (Racketeering Act thirteen) as well as an act listed in the Government's Notice of Intent to Seek the Death Penalty; d) the impact of Gethers's death on his family, and about Gethers's personal characteristics. For Darryl Green, the government also alleges that Green e) "urg[ed] Edward Washington to attempt to murder Richard Green on or about September 16, 2000," Notice of Intent to Seek Death Penalty, p. 3, an attempt which occurred before the racketeering acts alleged in the case, and f) that Green's behavior after the murder suggested a lack of remorse. For Morris, the government alleges g) that he participated in the arson murder of Shelby Caddell on or about August 24, 2001. The penalty phase will be about the defendants' character, and other alleged offenses committed by them that are unrelated to the offenses listed in the Superceding Indictment.

On the face of it--and this is all that the Court can see at this point-- penalty phase facts a), b) and c) are facts which involve the same proof as at trial, but the remainder, d) through f), involve facts which may well be inadmissible at the liability phase. In any event, to the extent that there is evidence overlap--and it is not likely to be substantial--such overlap can and should be accommodated as I described in the my memorandum of November 4, 2004.

SO ORDERED.